Supreme Court, U.S.
FILED

991203 NOV 15 1999

OFFICE OF THE CLERK
No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Dennis Theriot; Ann Rodriguez; Ronald Perrin; Norman A. Ronquille; David J. Dowell; Iris C. Isenmann; Herman J. Carbo; Maplewood Civic Association, Inc.
Petitioners,

v.

Parish of Jefferson, State of Louisiana; T. J. Ward, also known as Butch; Donald Jones; et al.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Haywood H. Hillyer III, La. Bar No. 6925
Attorney-at-Law
P.O. Box 15521
New Orleans, Louisiana 70175-5521
Telephone: (504) 899-0890
Facsimile: (504) 899-4851
Counsel of Record

Of Counsel:
Dominic N. Varrecchio, La. Bar No. 19456
1449 Magazine Street
New Orleans, Louisiana 70130
Telephone: (504) 524-8600

42 pp

QUESTIONS PRESENTED

1. Is the last districting scheme actually used by a political subdivision to hold elections within that jurisdiction the proper benchmark by which to measure Section 5 retrogression pursuant to the Voting Rights Act?

2. Did race predominate in the drawing of the boundaries of District 3 where the parish (political subdivision) intentionally drew the district to include an enhanced and non-compact black majority only after the Department of Justice made race-based demands that they do so?

3. Would the majority-minority district in question survive an analysis under the standard of strict scrutiny if the lower courts had properly found that race was the predominant consideration in the drawing of that district?

PARTIES TO THE PROCEEDING

Petitioners

Dennis Theriot, Ann Rodriguez, Ronald Perrin, Norman A. Ronquille, David J. Dowell, Iris C. Isenmann, Herman J. Carbo, and Maplewood Civic Association, Inc., a Louisiana not-for-profit corporation ("MCA"; this corporation has no parent companies, subsidiaries, or affiliates that have issued shares to the public).

Respondents

The Parish of Jefferson (of the State of Louisiana); Timothy Coulon, in his official capacity as President of Jefferson Parish; Aaron Broussard, in his official capacity as Chairman of the Jefferson Parish Council; and T. J. "Butch" Ward, Lloyd F. Giardina, Donald Jones, Edmond Muniz, John Lavarine, and Nick Giambelluca, all in their official capacities as members of the Jefferson Parish Council.

Intervenors

The United States of America through the Department of Justice ("DOJ"); the Council for the City of Kenner, State of Louisiana, and Terry McCarthy, Betty Bonura, Marc Johnson, Jeanie Black, John Lavarine, III, Michelle Branigan, and Phil Capitano in their respective capacities as members of the Kenner City Council.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES viii

OPINIONS BELOW xi

JURISDICTION xi

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED xi

STATEMENT OF THE CASE 1

ARGUMENT FOR GRANTING THE WRIT 4

ARGUMENT 1

The Fifth Circuit's affirmation of the trial court's holding that the Parish of Jefferson was properly forced to draw the post-1990 Census District 3 to meet an enhanced racial benchmark demanded by the DOJ is in direct conflict with this Court's earlier decisions. 6

ARGUMENT 2

The lower courts were in clear error in holding that District 3 was not drawn with racial considerations as the Parish of Jefferson's predominant motivation in the placement of its boundaries 11

ARGUMENT 3

District 3 is not a narrowly-tailored remedy to any Section 2 violation by the Parish of Jefferson, and should not survive an objective and proper examination under strict scrutiny 26

CONCLUSION 30

APPENDIX ..... Vols. I and II

Appendix A
Fifth Circuit Opinion, 8/17/99 ..... A-1

Appendix B
Notice of Appeal A-30

Appendix C
District Court Judgment, 8/24/97 ..... A-33

Appendix D
District Court Order and Reasons, 8/24/97 .. A-36

Appendix E
Magistrate's Order, 10/9/96 ..... A-71

Appendix F

Various maps revealing District's 3 racial gerrymander A-76

Map 1 Current Districting Plan showing all precincts drawn into District 3 without racial differentiation. A-76

Map 2 Current Districting Plan showing all BVAP majority precincts contained in Jefferson Parish and all precincts drawn into District 3 ..... A-77

Map 3 March, 1990 "interim" plan, with minor adjustments to the February 1990 first "interim" plan A-78

Map 4 February, 1990 first "interim" plan A-79

Map 5 "4-2-1" format districting plan last used by the Parish of Jefferson to hold regular elections in 1987 ..... A-80

May 6 Precinct map showing Maplewood Subdivision being divided between Districts 1 and 3 on a blatantly racial basis A-81

Map 7 Map showing City of Kenner split between several districts on a blatantly racial basis A-82

Map 8 Map showing City of Westwego split between several districts on a blatantly racial basis A-83

Map 9 Map showing an unpopulated land bridge created by precinct split solely to add BVAP to the current District 3 ..... A-84

Map 10 A copy of the map actually sold retail to the public by Parish of Jefferson with BVAP of District 3 prominently displayed, but with only the total population of the other districts indicated A-85

Appendix G
Parish of Jefferson's 8/22/91 letter submissions to the DOJ of the current plan, with admissions and explanation of the current racial gerrymander. A-86

Appendix H
Parish of Jefferson's attorney M. Nan Alessandra's letter of 8/15/91 to the DOJ explaining the Parish's current racial gerrymander being created to meet the DOJ's demand for an enhanced BVAP majority within District 3 ..... A-90

Appendix I
David Gelfand's letter of 6/19/91 to the DOJ revealing collusion between the DOJ and the EJC plaintiffs to force the Parish to adopt an enhanced BVAP majority within the post-1990 Census adjusted District 3 ..... A-100

Appendix J
David Gelfand's letter of 5/10/91 to M. Nan Alessandra accepting the current racial gerrymander as a settlement to the EJC suit. A-101

Appendix K
Rule 11 hearing transcript of 6/24/91 containing the sworn testimony of Parish of Jefferson's attorney M. Nan Alessandra concerning DOJ's demands for an enhanced BVAP majority and her fears of a delay in the regular 1991 elections unless the Parish capitulated to the DOJ's demands A-117

Appendix L
Sworn Affidavit of M. Nan Alessandra filed in the EJC trial court record on 6/25/91 to support her testimony in the EJC trial court's Rule 11 hearing of 6/24/91 ..... A-120

TABLE OF AUTHORITIES

Cases

Abrams v. Johnson,
521 U.S. 74 (1997) 5, 10, 19, 25

Beer v. United States,
425 U.S. 130 (1976) 5, 10

Bush v. Vera,
517 U.S. 952 (1996) 5, 21, 24

Clark v. Calhoun County, Miss.,
88 F. 3d 1393 (5th Cir. 1996) 6, 27, 28

DeWitt v. Wilson,
856 F. Supp. 1409 (E.D. Ca. 1994) ..... .25

Diaz v. Silver,
978 F. Supp. 96 (E.D. N.Y. 1997, affirmed without opinion, Silver v. Diaz, 522 U.S. 801, (1997) .. 16

East Jefferson Coalition v. The Parish of Jefferson,
691 F. Supp. 991 (E.D. La. 1989) 1

East Jefferson Coalition v. The Parish of Jefferson,
703 F. Supp. 28 (E.D. La. 1989) 1

East Jefferson Coalition v. The Parish of Jefferson,
706 F. Supp. 470 (E.D. La. 1989) 1

East Jefferson Coalition for Leadership and Development v. The Parish of Jefferson
926 F. 2d. 487 (5th Cir. 1991) 1, 2

Hays v. State of Louisiana,
936 F. Supp. 360 (W.D. La. 1996) 30

Holder v. Hall,
512 U.S. 874 (1994) 5, 10

Johnson v. Mortham,
926 F. Supp. 1460 (N.D., Fla. 1996) 28

Karcher v. Daggett
462 U.S. 725 (1983) 21

Miller v. Johnson,
515 U.S. 900 (1995) . . . . . 4, passim

Regents of University of California v. Bakke,
438 U.S. 265 (1978) 5

Richmond v. J.A. Croson Co.,
488 U.S. 469 (1989) 5, 30

Shaw v. Reno,
509 U.S. 630 (1993) 5

Thornburg v. Gingles,
478 U.S. 30 (1986) 5, 8

Wygant v. Jackson Board of Education,
476 U.S. 267 (1986) 5

Young v. Fordice,
520 U.S. 273 (1997) 6, 10

Statues

14th Amendment, §1, United States Constitution 7

42 U.S.C. §1973 (§§ 2 and 5, Voting Rights Act of 1965, §§ 2, 5 xi

42 U.S.C. §§1973(a), 1973c xi

42 U.S.C. §§1983 xi

OPINIONS BELOW

The opinion of the United States of Appeals for the Fifth Circuit in this matter is reported at 185 F.3d. 477 (5th Cir. 1999). A copy of the Opinion appears in the Appendix, at p. A-1. The Opinion of the District Court for the Eastern District of Louisiana is published at 966 F. Supp. 1435 (1997) and appears in the Appendix at A-36.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its Opinion on August 17, 1999. This Petition for Writ of Certiorari is filed within an extension that expires on January 18, 2000. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 14 to the U.S. Constitution
The Equal Protection Clause

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1973 (§§ 2 and 5, Voting Rights Act of 1965, §§ 2, 5; 42 U.S.C. §§ 1973) (a), 1973c; 42 U.S.C. § 1983

STATEMENT OF THE CASE

Petitioners are the Maplewood Civic Association, Inc. ("MCA") and seven of its members who reside within Jefferson Parish (County) Council District 3. They allege that the Parish Council's election districting scheme is the product of an intentional and unconstitutional racial classification and racial gerrymander which they seek to have remedied by a new redistricting made on a basis not predominantly motivated by racial considerations. The MCA represents a relatively small and racially integrated residential subdivision which was divided between two council districts by the current election districting scheme on an obvious racial basis, with the more integrated portion of the subdivision placed within the predominately black District 3 and the largely white populated center portion of the subdivision awkwardly removed from District 3 and placed within predominately white District 1. They also allege that other residential subdivisions, towns, cities, and established voter precincts were split in a blatantly racial manner into the separate council districts in order to enhance the black majority contained within District 3.

The current districting format for the Jefferson Parish Council includes six single-member districts approximately equal in population and one at-large member elected parish-wide (the "6-1" format) and was adopted after African-American voters (the "EJC plaintiffs") sued successfully[1] to

---

[1] See East Jefferson Coalition v. The Parish of Jefferson, 691 F. Supp. 991, (E.D. La. 1988); ("EJC"); see also the reported interim decisions, *East Jefferson Coalition v. Parish of Jefferson,* 703 F. Supp. 28 (E.D. La. 1989) ("EJC II"), *East Jefferson Coalition v. Parish of Jefferson,* 706 F. Supp. 470 (E.D. La. 1989)

have an earlier districting scheme (the "4-2-1" format)[2] declared to be in violation of Section 2 of the Voting Rights Act ("VRA"), as the larger districts contained in that format were deemed to have diluted the minority vote in the Parish.

The EJC plaintiffs at their trial showed, and the trial court agreed, that they were able to form a majority of 50.12% black voting age population ("BVAP") in one single member district under the "6-1" format when utilizing the 1980 Census figures. The Parish Council, led by longtime incumbent and Democrat James Lawson, then adopted an interim "6-1" plan which included a District 3 with a 50.12% BVAP majority. Upon release of the 1990 Census there was revealed a substantial under-population within that interim District 3. That now under-populated district's boundaries included (as per the 1990 Census' population figures) a BVAP majority of 52.3%, and that district was then required to add substantial new population in order to meet one-person/one-vote requirements.

Maintaining a BVAP majority after adding the new population to the district then proved problematic as, in order to confect the interim District 3 utilizing the 1980 Census figures, the EJC plaintiffs and the Parish had included virtually all of the black population which reasonably could be drawn to be included within the "interim" District 3, in

---

("EJC III") and *East Jefferson Coalition for Leadership and Development v. Parish of Jefferson*, 926 F.2D. 487 (5th Cir. 1991) ("EJC IV"). The Trial Court in the instant case took judicial notice of the entire record of the EJC case.

[2] The smallest districts in this format included four single-member districts, each made up of approximately one-fourth of the Parish's population.

order to achieve the original 50.12% BVAP majority. The Parish, when required to adjust the population of the districts to the new census, made every attempt to maintain a BVAP majority in the adjusted District 3, but simply could not do so in a geographically sensible manner. The EJC plaintiffs and the United States, through the Department of Justice ("DOJ"), after release of the 1990 Census, nonetheless then increased their demands from the earlier goal and agreement of a simple BVAP majority and demanded that the Parish draw the adjusted District 3 to have a minimum of 52.3% BVAP, lest they then instigate additional litigation, a likely denial of pre-clearance by the DOJ, and a delay in the regular 1991 elections. This requirement mandated that the Parish connect to District 3 the settlements of black population in the Harvey area, an area geographically separated from all of the earlier plans for a black majority district.

At this point, the Parish Council, again led by James Lawson, then chose to ultimately adopt a "6-1" plan which included the Harvey area and an enhanced 57.1% BVAP majority in order to gain the support of the EJC plaintiffs in adopting that plan as a settlement to the pending litigation. In doing so, the Parish drew the current District 3 which, for the first time in the Parish's history, split residential subdivisions, cities, towns, established voting districts and precincts on an exclusively racial basis, creating the 57.1% BVAP majority in that district. This lawsuit challenges that districting plan.[3]

---

[3] The (Theriot) writ petitioners here will be referred to as the "plaintiffs," the Parish of Jefferson and the elected officials also named here as defendants will be referred to by their respective names, or as the "defendants," the "Parish," or "Jefferson Parish." The United States, through the Department of Justice, will

Shortly after the Supreme Court decided Miller v. Johnson, 515 U.S. 900 (1995), the petitioners filed suit to overturn, as an impermissible racial gerrymander, the current districting plan of the Jefferson Parish Council. After discovery and extensive motion practice, the case was bench-tried on March 10-12, 1997, with the Trial Court ruling in the defendants' favor to maintain the current districting scheme. After judgment was issued and a new trial and other relief were denied, an appeal timely followed. After extensive briefing and oral argument, the Court of Appeals for the Fifth Circuit, on August 17, 1999, affirmed the Trial Court's decision.

ARGUMENT FOR GRANTING WRIT

This is the most important voting rights matter that this Court will have an opportunity to decide this year, and perhaps for many years to come. The published opinion of the Fifth Circuit, if allowed by this Court to stand, will require political subdivisions to engage in impermissible racial gerrymandering upon the release of the 2000 Census – in direct conflict with this Court's recent decisions and earlier decisions by the Fifth Circuit. The Fifth Circuit's holding here mandates that a heightened BVAP in an election district, shown by a new census and resulting from population loss, must be used as the "benchmark" to determine retrogression under Section 5 of the VRA. Using such benchmarks after the release of a new census will cause chaos in the reapportionment of numerous subdivisions if this ruling is allowed to be the law of the Fifth Circuit. Political subdivisions within states covered by the Voting Rights Act,

---

hereinafter be referred to as the "DOJ."

at the prodding of prospective plaintiffs and a very activist and sympathetic DOJ, will then be forced to comply with one-person/one-vote requirements while maintaining unreasonably-demanded racial benchmarks. Such racial classifications have been struck down by this court in the line of cases following Shaw v. Reno, 509 U.S. 630 (1993).

Further, the published opinion of the Fifth Circuit here is in direct conflict with this Court's earlier holdings with regard to the proof of race predominating in the drawing of election districts. It is imperative that the Fifth Circuit's decision here on that issue be reviewed and corrected. Additionally, as the district challenged here was not a narrowly-tailored remedy to past discrimination – but an excessive racial classification used to separate voters – the legislative action creating the district should not be allowed to escape or withstand a proper examination under strict scrutiny.

With redistricting under the year 2000 Census fast approaching, it is urgent, and of national importance, that this Court provide guidance with respect to the issues presented by this case. In affirming and constructively requiring the racial segregation of voters into separate election districts in the manner used here, the published decision of the Court of Appeals conflicts in principle with, and undermines the precedential value of, the Supreme Court cases of Abrams v. Johnson, 521 U.S.74 (1997); Beer v. United States, 425 U.S. 130 (1976); Bush v. Vera, 517 U.S. 952 (1996); Holder v. Hall, 512 U.S. 874 (1994); Miller v. Johnson, 515 U.S. 900 (1995); Regents of University of California v. Bakke, 438 U.S. 265 (1978); Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Shaw v. Reno, 113 S.Ct. 2816 (1993); Thornburg v. Gingles, 478 U.S. 30 (1986); Wygant v. Jackson Board of

Education, 476 U.S. 276 (1986); Young v. Fordice, 920 U.S. 273 (1997); and the Fifth Circuit's decision in Clark v. Calhoun County, Miss., 88 F. 3d 1392 (5th Cir. 1996).

ARGUMENT 1

The Fifth Circuit's affirmation of the trial court's holding that the Parish of Jefferson was properly forced to draw the post-1990 Census District 3 to meet an enhanced racial benchmark demanded by the DOJ is in direct conflict with this Court's earlier decisions.

The imposition upon political subdivisions covered by the Voting Rights Act, that they avoid Section 5 retrogression violations by being forced to maintain the racial population percentages found under a new census in majority/minority election districts when that census also shows the districts are under-populated, will lead to chaos and wholesale racial gerrymandering after release of the year 2000 Census. The lower courts in this case were both in clear error in holding that a 52.3% BVAP majority population was a legal requirement to be met by Jefferson Parish in order to avoid Section 5 retrogression in the post-1990-Census-adjusted District 3. The requirement that the Parish draw a district which met the enhanced 52.3% BVAP "benchmark" demanded by the DOJ and the EJC plaintiffs, while on its face an innocuous and seemingly reasonable request, was in fact unreasonable, and required an unconstitutional racial gerrymander.

The EJC plaintiffs and the DOJ insisted upon a 52.3% BVAP benchmark for any post-1990 Census District 3 despite

the fact that elections were never held from the "interim" District 3, and that the interim District 3 was surrounded by a large band of predominantly white precincts which would have to be split, altered, and otherwise traversed in order to connect any new black majority areas (here, the Harvey area) to the adjusted District 3. The post-1990 Census population of the Parish showed that, in order to add new black population to the interim District 3, traditional districting principles would have to be violated; precincts, towns, cities, residential subdivisions would have to be split along racial lines; and unpopulated land bridges would have to be created in order to remove white population from, and to include far-flung areas of black population within, District 3. Plaintiffs assert that these legislative actions violate the Equal Protection Clause of the 14th Amendment as they are unconstitutional racial classifications.

Here, this Court should examine two questions: First, must a political subdivision be absolutely required to maintain a BVAP majority in a district after a new census, when those new census figures also reveal a black population so dispersed as to require a blatant racial gerrymander in order to maintain the BVAP majority after the required adding of new population to the adjusted district? Second, must a political subdivision, upon the release of a new census showing an under-populated majority/minority district, use as the Section 5 retrogression "benchmark" the new minority VAP found within the older boundaries of the pre-adjusted district as counted by the new census, when to meet that certain percentage would force a blatant racial gerrymander in order to add new minority population.

In response to the first question, this Court has

addressed in Thornburg v. Gingles, *supra* ("Gingles"), the standards used to require political subdivisions to draw majority/minority election districts to avoid Section 2 (minority vote dilution) violations. Those standards include the necessity that a minority population be geographically compact in order to form a sensibly drawn majority/minority election district. Along that same line of reasoning, it would be logical that in order to require a jurisdiction to retain an absolute majority/minority VAP district when reapportioning its districts, the jurisdiction's minority population under that new census must be sufficiently compact to permit the drawing of a geographically compact election district.

Here, the Gingles requirement of compactness was met by the EJC plaintiffs to form a bare BVAP majority (50.12%) under the 1980 Census, but no court has ever re-examined for that compactness after the release of the 1990 Census–and such re-examination should have been required here under Gingles prior to the DOJ demanding that the Parish maintain an absolute BVAP majority (much less their enhanced demands for a greater BVAP percentage) in District 3 after the release of the 1990 Census. Quite the contrary, the under-populated (post-1990 Census) interim District 3 was surrounded by white population and could not, absent a blatant racial gerrymander, add the requisite black population needed to maintain a BVAP majority, much less the DOJ's increased demand of 52.31%. Near the end of the EJC litigation, the EJC Trial Court was so disgusted by the Parish's capitulation to the demands of the EJC plaintiffs and the DOJ in its adoption of the gerrymander created by the current plan that it rejected the plan, and appointed a Special Master to redraw the "interim" election districts as adjusted to the 1990 Census. The Special Master found that a near

majority BVAP plurality District 3 (which included a healthy black voter registration majority) was the only reasonable adjustment of the districts under the new census. This is the only objective finding which could have been reached when applying Gingles to the EJC plaintiffs' claims. Nonetheless, the Fifth Circuit at the end of the EJC litigation ignored the Gingles requirements and instead summarily ordered the implementation of a BVAP majority district after adjustment to the 1990 Census, and further, specifically ordered the implementation of the current gerrymander with its non-compact BVAP majority.

As to the second question, a requirement that a political subdivision in all cases maintain as a Section 5 retrogression "benchmark" the exact minority VAP percentage found within a now under-populated majority/minority district (as shown by a new census) is unreasonable; as it actually requires, in certain cases, racial gerrymandering otherwise prohibited by this Court. Petitioners readily concede that there may be jurisdictions with majority/minority districts that can easily be drawn to retain certain minority VAP percentages, but that in many subdivisions, such as the Parish of Jefferson, the requirement that they be forced to maintain particular racial percentages in remedial districts may be difficult if not impossible to meet, as was the case here upon the release of the 1990 Census.

In the instant case, Jefferson Parish was warned by the DOJ that pre-clearance of its election district plans would be denied and that the regularly-scheduled 1991 elections would be delayed if the Parish resisted drawing the post-1990

Census District 3 with a minimum 52.3% BVAP majority.[4] It is important to note that the Parish's attorneys at the time openly questioned the legality of DOJ's new and enhanced race-based requirement, but nonetheless advised the Parish to capitulate to these demands in order to avoid a delay in the elections. The result is the current 110-sided District 3 that is the least compact, most geographically far-flung, most disruptive and race-conscious district ever adopted, or even proposed, in the history of Jefferson Parish.[5]

This Court in Beer v. United States, 425 U.S. 130, 141 (1976) established a "non-retrogression" principle: that any redistricting plan is sustainable under Section 5 if it enhances to any degree the position of racial minorities with respect to the exercise of their voting rights. In deciding upon proper benchmarks to be used in avoiding Section 5 retrogression, this Court has ruled that it is the districting plan actually in effect – the existing voting status – last used by the jurisdiction which is the proper benchmark. Abrams v. Johnson, 521 U.S. at 97. See also Holder v. Hall, 512 U.S. 874, 883-884 (1994) and Young v. Fordice, 520 U.S. 273 (1997).

It is undisputed that all of the previous plans used by Jefferson Parish to elect council members included only four

---

[4] Appendix K, p. A-108, 109, 110, 116; Appendix L, p. A-122, 123, 125, 126; Appendix H, p. A-96 and 97. Further, it is also clear from the record that the EJC plaintiffs and their legal counsel acted in collusion with the DOJ at that point in the litigation to force the Parish to adopt the enhanced black-majority district. See Appendix I, p. A-100.

[5] Appendix F, various maps.

single-member districts, none of which had a BVAP population exceeding 24%. The first "interim" six-single district plan adopted by the Parish in 1989 included a 46% BVAP majority district. Soon after, at the EJC plaintiffs' and the DOJ's prodding, the Parish altered that plan to adopt the "interim" District 3 with the 50.12% BVAP majority.[6] Again, none of the interim six-single member district plans were ever used to hold elections prior to the 1991 election, and the last district plan actually used to elect members of the Parish council had four single-member districts (the "4-2-1"districting format) with the highest BVAP in any one district at 24%. It is the petitioners' position here, as it was at trial and on appeal, that the creation in 1991 of any black-majority district, or even a single-member district with a strong BVAP plurality, actually enhanced the position of racial minorities with respect to voting rights in Jefferson Parish and could not be considered to be retrogressive as compared to the districting schemes previously used to actually elect council members. In that light, the lower courts' holdings that the Parish of Jefferson was legally bound to create a 52.3% BVAP post-1990 Census District 3 – in order to avoid a Section 5 violation – is clearly in error as a matter of law.

ARGUMENT 2

The lower courts were in clear error in holding that District 3 was not drawn with racial considerations as the Parish of Jefferson's predominant motivation in the placement of its boundaries.

---

6 Appendix F, Maps 3, 4, p. A-78, 79.

The Theriot plaintiffs met their burden of proof [7] in providing clear and convincing documentary evidence and testimony which proves that the current District 3's boundaries were drawn with race as the predominant motivation, in order to meet or exceed the 52.3% BVAP requirement insisted upon by the DOJ to gain Section 5 pre-clearance, to settle the pending EJC litigation, and to avoid a delay in the scheduled 1991 elections.

The Theriot plaintiffs at trial proved that when the Parish drew the current districts, including the current District 3, it disregarded and subordinated traditional race-neutral districting principles – such as compactness, and respect for political subdivisions including established municipalities, towns, and even individual voter precincts. The traditional and long-respected north/south character of the Parish's West Bank councilmanic districts was completely abandoned only after the Parish Council members,[8] led by James Lawson, made the conscious decision to draw an enhanced BVAP majority of 55%[9] or more within the current District 3.

---

[7] Miller v. Johnson, 515 U.S. at 916.

[8] See Appendix F, various maps, as well as the trial testimony of Ward, p. 76, 77, 79; Gandolfi, p. 106, 109; DeViney, p. 38; Hughes, p. 100-101; Hooper, p. 26; and Lawson, p. 108, 109, 113, 132. Plaintiffs here will refer to witnesses' testimony by giving the last name of the witness, followed by the page number of the portion of the trial record where the witnesses testimony is actually referenced. The plaintiffs are unable, at this time, to reference individual witnesses' testimony by the record or Bates numbers of the pages where this testimony appears in the trial record.

[9] While the post-1990 Census BVAP found within the boundaries of the under-populated interim District 3 was 52.3%,

It is important to note that despite the lower courts' findings that the drastic evolution of District 3 was the result of Lawson's attempt to improve his political fortunes, he was perfectly willing to use his council majority to draw earlier districting plans that were all very similar to the Special Master's Plan, and that Lawson and his council majority was also perfectly willing to actually allow the Special Master's Plan to be used to hold the regular 1991 elections. The Parish of Jefferson never objected at any time to the implementation of the Special Master's Plan, as it was the DOJ and the EJC plaintiffs who objected to the intrusion by the EJC trial court (via appointment of the Special Master) into the "legislative bailiwick" – thus blocking the implementation of a sensible BVAP plurality plan and prompting the Fifth Circuit to summarily order implementation of the current plan.

It is abundantly clear from Lawson's own testimony, and an objective review of the record that Lawson – a Democrat with a history of strong support in the Parish's black community – actually subordinated his own political interests to the creation of an enhanced BVAP majority in the current District 3 in order to avoid a feared delay of the scheduled 1991 elections. He was willing to yield to the DOJ's racial demands, even though the result would be his

---

the Parish's Attorney, M. Nan Alessandra understood the DOJ's post-1990 Census demand to be a 53% BVAP majority, as memorialized by her hearing testimony (Appendix K, p. A-111), her supporting affidavit (Appendix L, p. A-122, 123, 125) and her August 15, 1991 letter to the DOJ (Appendix H, p. A-90). Lawson then sought to "meet or beat" the EJC plaintiffs' 55% BVAP proposal, which he did, in order to gain their support of his plan as settlement of their litigation.

seeking re-election against a fellow incumbent, Republican Lloyd Giardina, in a new district stripped of black voters. This was politically detrimental; while Lawson barely won reelection in 1991, Giardina came back to defeat him in that same district in 1995.

As was true in Miller v. Johnson, when the shape of District 3 is viewed "in conjunction with its racial and population densities," the fact that race was the predominant factor in the drawing of this district becomes overwhelmingly clear. Every time the district splits a broadly-peopled precinct, town, municipality, or residential subdivision, it gathers in a disproportionate number of black voters or excludes a disproportionate number of white voters. Every time that the district splits a precinct to create an unpopulated or under-populated land bridge, it does the same. The attached maps of District 3[10] shows that the district starts on the "East Bank" (which is north of the "West Bank") then jumps across the Mississippi River to two majority-black neighborhoods, then goes south along the western border, through unpopulated marshes, to the southern end of the Parish, and then travels back up northward and eastward to collect other additional and dispersed pockets of black population, blatantly splitting municipalities, established voting precincts and subdivisions to enhance its black population majority.[11] In fact, the district so deviates from the compactness of previous proposals for a black-majority district, that Lawson worried that his plan was not compact enough to gain the EJC

---

[10] Appendix F, maps 1, 2, A-76.

[11] Appendix F, map 2, A-77. See also Plaintiffs' Exhibits 1, 3, 5, 7, and 8 contained in the trial record.

trial court's approval, and because of those concerns he deliberately and successfully sought to raise its BVAP in excess of 55% in order to gain the EJC plaintiffs' support of his plan as a settlement.[12]

The lower courts also clearly erred in holding that geographic realities and traditional districting principles were not subordinated to race in the drawing of District 3 and ignored the testimony and evidence presented at trial which clearly proved that particular precincts were split solely to add black populations to District 3, to create land bridges which added black population to District 3, or to minimize the white population added to District 3. In the Parish's August 15 and 22, 1991 submissions of the current districting plan to the DOJ for pre-clearance, the Parish wrote to the DOJ an explanation of particular precinct splits and squarely admitted that these actions were taken to "enhance" the BVAP of District 3.[13] This admission is corroborated by other testimony from Alan Gandolfi, by fellow Parish Council staffers Kenny Hughes and Gary Duker, and by Dr. John Wildgen, the cartographer who actually drew the districts at the direction of the Parish Council research staff and the sworn affidavit of the Parish's attorney, M. Nan Alessandra.[14]

Where the Parish admitted splitting precincts to

---

[12] Please see Gandolfi, p. 85, 86, 90, 92, 93, 94, 114, 118; Duker, p. 15, 30, 31, 41, 43; Hughes, p. 94-95, 126-127; Lawson, p. 71-73, 88-89, 96; and DeViney, p. 21.

[13] Appendix G, p. A-86; Appendix H, p. A-90.

[14] Wildgen, p. 143, 145-148, 158, 170-171; Duker, p. 57-59; Hughes, Gandolfi (cites omitted here) and Alessandra, Appendix L, p. A-123, 124.

enhance the BVAP majority of District 3 in its submission of the current plan to the DOJ for pre-clearance, it bound the Parish "...as an adoptive admission to all of the statements...contained therein." Diaz v. Silver, 978 F. Supp. 96, 120 (E.D. N.Y. 1997) affirmed without opinion, Silver v. Diaz, ___ v. ___, 118 S.Ct. 36 (1997). Further, as in Diaz the absence of any statement of Lawson's (or the Parish's) alleged political motivation in the VRA pre-clearance request to the DOJ also weighs against their present claims of a "political" rather than racial motivation, see Diaz, 978 F. Supp. at 120.*

The Fifth Circuit's holding entirely discounts the strong hand of the DOJ in forcing the Parish to alter the more sensible geography of the earlier District 3 into the egregious racial gerrymander that is its current form.[15] As this Court has shown in Miller,[16] by demanding a maximization of majority-minority districts, the Justice Department impermissible encouraged – in effect mandated – racial gerrymandering. The Parish's capitulation here only reinforces the conclusion that it knowingly allowed race to become the predominant factor in the drawing of the districts.

Where the lower courts held that "politics," "one-person/one-vote," or "contiguity" drove the design of the current districts, particularly with regard to the "V" shape of District 3, it again ignores the overwhelming testimony and evidence, and makes these findings in error. The trial testimony of James Lawson, his anticipated 1991 opponent,

---

[15] Appendix A, p. ___.

[16] Miller v. Johnson, 515 U.S. at 900-918.

fellow incumbent Lloyd Giardina, as well as Parish Council staff members, show without dispute that Lawson would have politically benefitted in his re-election effort had he chosen to include within his District 2 any of the majority black precincts which were ultimately placed into the adjacent District 3 in order to enhance that district's black majority.[17] This action by Lawson flies in the face of the trial court's finding that Lawson created the boundaries of the districts solely to benefit himself politically.[18] Various witnesses, including Parish Council staffers, squarely testified that the "V" shape of the district was chosen to include the heavily black population settlements of the Harvey area needed to enhance the BVAP majority within District 3. Additionally, the fact that the six incumbents who all anticipated running for reelection in 1991 agreed to the drawing of a black-majority district from which none would seek election, in full knowledge that at least one would not have a district and that two of them would be required to face each other as opponents for reelection,[19] plainly reveals that incumbency protection was absolutely compromised for racial considerations. Lawson's actions to enhance the BVAP of District 3 over and above any Section 2 remedy in order to effect the settlement of the EJC litigation – a racial manipulation of boundaries made to Lawson's admitted political detriment – further clearly proves that the traditional

---

[17] Lawson, p. 67, 90, 91, 92, 98, Giardina, p. 13, 14, Ward, 41, Hughes, p. 126.

[18] See Appendix D, p.___, "Lawson set out to insure that his strongest constituencies would be placed in District 2."

[19] Ward, p. 32, 33; Duker, p. 24; Evans, p. 36, 37; Hooper, p. 17, 59-60, Appendix L, p. A-123, 124.

and logically universal districting principle of incumbency protection was subordinated to race.

The Parish of Jefferson at the time of the drawing of the current plan had a total of 31 BVAP majority precincts.[20] The City of Kenner has 34 total precincts of which only nine, including all eight of Kenner's BVAP majority precincts, are drawn into the current District 3.[21] Only one of Kenner's 26 white majority precincts are drawn into the current District 3, with that precinct being Precinct 13K(B), which does contain a white majority VAP, but was admittedly divided by the Parish to place the more heavily black portion of the previously undivided Precinct 13K into District 3 in order to meet the one-person/one-vote rule while adding a minimum of white population.[22] The City of Westwego has a total of eight precincts, of which only one, Precinct 2W, has a BVAP majority and is the only Westwego precinct drawn to be included within the District 3, as all of Westwego's white majority precincts are placed into other districts.[23] The township of Lafitte contains an overwhelmingly white majority population, and prior to the adoption of the current plan had only one voting precinct. In the current districting plan, the town was divided to create an additional precinct, the unpopulated Precinct 1L, which was admittedly used by the Parish to create a land bridge which would connect the Harvey area's black population to District 3.[24] The town's

---

20 Appendix F, Map 2, A-77. See also Plaintiffs' Exhibits 1, 3, 5, and 7 admitted into evidence at trial.

21 Appendix F, Map 7, p. A-82.

22 Gandolfi, p. 76-77, 144-145, 151.

23 Appendix F, Map 8, p. A-83.

24 Appendix F, Map 9, p. A-84, Appendix I, p. A-123, 124.

remaining heavily white population was placed into the newly created Precinct 2, which was then placed into white majority District 2. The only significant settlements of the Parish's black population not included within the current boundaries of District 3 are the areas of Gretna/McDonoughville (Precincts 1G, 4G, 6G and 7G), and Shrewsbury (Precincts 107, 131 and 132).[25] There is no practical way that any of these precincts could have been included within any majority-black district (utilizing a "6-1" districting format) also drawn to include the black-majority areas located in Kenner and the Avondale area.[26] The lower courts ruled in clear error that the failure to include those areas within District 3 proves that District 3 was not drawn to maximize its black population.

The splitting of the City of Kenner was also done for purely racial reasons.[27] The incumbent Councilman Hooper reluctantly gave up Kenner's black precincts solely in order to draw the current BVAP majority District 3.[28] Though the defendants claimed at trial that the City of Kenner had a desire to be split in order to increase its political influence, the evidence and testimony in the trial court record makes it very questionable that the Parish ever considered this at the time of the drawing of the current districts In addressing a city government's (alleged) preference to be split among various districts, the Supreme Court in Abrams v. Johnson declared that a city's "alleged urge to be segregated for congressional districting purposes, however, cannot vitiate the Equal

---

[25] Appendix F, Map 2, p. A-77.

[26] Appendix F, Map 2, p. A-77, Ward, p. 37, Giardina, p. 29-30, Powell, p. 99.

[27] Hooper, p. 59, 60; Gandolfi, p. 76-77, 144-145, 151.

[28] Hooper, p. 39, 59-60.

Protection Rights of...(a) district's voters." 521 U.S. at 89.

The lower courts also ignored the evidence and the admissions by the Parish that the Maplewood Subdivision was split along racial lines only after Lawson committed to a District 3 with an excess of a 55% BVAP majority; a split of the residential subdivision which clearly enhanced the BVAP majority of District 3.[29] Instead, the lower courts chose to honor the incredible testimony of Lawson, who claimed that the subdivision was divided in a coincidentally disproportionate racial gerrymander in order to prevent one elderly lady from raising "political Cain" unless she was placed into Butch Ward's District 1.[30]

The lower courts further erred in ruling that unpopulated land bridges were not created to enhance the black population majority in District 3, but were motivated by the Parish's meeting the "one-person/one-vote" requirement. These land bridges were admitted by the defendant Parish's staffers Gandolfi and Hughes to have been specifically created to allow District 3 to go around the bottom of the Parish to pick up and include the black population areas east of the Harvey Canal, while, at the same time, picking up the minimum additional white population. Dr. John Wildgen, the cartographer charged with actually drawing the boundaries of the district, testified that in creating its boundaries, he concentrated virtually exclusively upon on racial

---

[29] See Appendix G, p. A-86 and Appendix H, p. A-90, and Appendix L, p. A-123, 124 where the Parish admits to have split the Maplewood precinct 213 as well as other precincts in order to enhance the BVAP majority of the current District 3.

[30] See Appendix D, p.___.

demographics[31] and considered essentially no other factors except contiguity and the ubiquitous constitutional "one-person/one-vote" requirement.[32] The software he used, like the REDAPPL software in Bush v. Vera, *supra*, contained only racial data on a block-by-block level; other data was at precinct level.

James Lawson plainly testified that the current District 3 was drawn with a 57.1% BVAP majority to "meet or beat" the 55% BVAP percentage of black voters contained in the EJC plaintiffs' proposed plan, in order for Lawson to gain the support of the EJC plaintiffs in a settlement of that litigation, and also to avoid a delay of the Fall 1991 elections.[33] It is not disputed that Lawson had already gained the support of a majority of the Parish Council to support his plan to draw the six single-member councilmanic districts.[34] It is also not disputed that the three East Bank councilmanic districts boundaries, as well as the approximate boundaries of Ward's West Bank District 1, were agreed upon by the incumbents serving those districts, and that the vast majority of attention and boundary disputes involved Districts 2 and 3, both centered on the West Bank.[35]

---

[31] See Wildgen, p. 154-156.

[32] "Absolute population equality [is] the paramount objective." Karcher v. Daggett 462 U.S. 725, 732 (1983).

[33] Lawson, p. 71-73, 88-89, 94, 95, 97, 98, 124, 125.

[34] Ward, p, 30, Gandolfi, p. 95, 114, 132, DeViney, p. 26, Hughes, p. 80, 84, Lawson, p. 68, 69, 133, 134, Giardina, p. 20, 40, 44, 45, 53-54, Muniz, p. 20, Hooper, p. 51. See also Appendix D, p. ___ (where the Theriot trial court holding accepts this).

[35] Gandolfi, 128-129, Hughes, p. 76, Muniz, p. 58, Hooper, p. 35, Lawson, p. 68.

Under cross examination, Lawson testified that he used the EJC plaintiffs' 55% BVAP percentage contained in their proposed District 3 as a minimum racial baseline to be included in the plan adopted by the Council.[36] Lawson's testimony was corroborated by that of Parish Council staff members Alan Gandolfi and Kenneth Hughes, who testified that there were "many" conversations with Lawson about the need to "meet or beat" the EJC plaintiffs' proposal of a District 3 which included a BVAP of 55% in order to enlist the EJC plaintiffs' support for a settlement of the pending EJC litigation.[37] Much of Council staffer Gary Duker's testimony, in response to direct questions asked by the trial court, also clearly corroborated the position that the Parish was forced to create a district with an enhanced black majority in order to bring an end to the EJC litigation,[38] and that in order to also achieve pre-clearance from the DOJ, Lawson and the Parish labored with the belief that its districting plan was again required "to be at least equal" to or exceed the 55% BVAP majority of the EJC plaintiffs' plan.

Gandolfi also testified that Lawson was particularly concerned that the EJC trial court would object to the non-compactness of Lawson's District 3 unless the EJC plaintiffs joined Lawson and his council majority in presenting the non-compact District 3 as a joint settlement.[39]

The trial court appeared to fully understand Lawson's racial motives and his ultimate ability to achieve his goal of

---

36 Lawson, p. 72, 88-89.

37 Gandolfi, p. 85, 86, 90, 92-94, Hughes, p. 94-95, 126-127.

38 See Duker, p. 30.

39 Gandolfi, p. 86.

a settlement by drawing a District 3 which had a higher BVAP majority, as evidenced by the Court's comments from the bench.[40] Nonetheless, the trial court ruled and the Fifth Circuit affirmed, both in error, that Lawson's motivations were "political in nature,"[41] and that Lawson's intentionally drawing the district with an enhanced racial majority "was political, not racial,"[42] as it was "Lawson's albeit misguided appreciation of the situation which resulted in this (race-based) jump."[43] But to the contrary, the record clearly shows that Lawson's (and the Parish's) drawing the district with an enhanced black majority was done only to comply with the purely racial reasons of the DOJ and the EJC plaintiffs, and that this "misguided" action met none of the permissible criteria for race-based government action.

The Department of Justice actively reinforced the Parish's belief that it would not preclear any plan without an enhanced black-majority district, and that the DOJ would not accept simply a black-majority district as a remedy.[44] The DOJ insisted upon the Parish drawing a district with an enhanced black majority – despite the absolute difficulty in drawing such a district[45] – and in its communications with the Parish's counsel, M. Nan Alessandra, left the distinct impression that it would refuse pre-clearance of any districting plan that did not include an enhanced black

---

40 See Gandolfi testimony, p. 90, with the exchange between the trial court and witness Gandolfi.

41 See Appendix D, p.___.

42 See Appendix D, p.___.

43 See Appendix D, p.___.

44 Appendix K, p. A-108, 109, 110, 116; Appendix L, p. A-122, 123, 125, 126; and Appendix H, p. A-96, 97.

45 Appendix K. p. A-108, 109; Appendix L, p. A-122.

majority district, resulting in a delay of the regular 1991 elections.

The lower courts were also in clear error in admitting and giving weight to evidence presented by the defense and the DOJ at trial which purported to show that the Parish considered community of interest concerns in joining together the various geographically separate majority black precincts which make up the current District 3. Any purported community of interest data must have been considered by the political subdivision at the time of the creation of the election districts in order for such data to be relevant into an inquiry regarding race-based districting. See Bush v. Vera, *supra*. None of the purported community of interest data, historical data or the economic data presented by the defendants at trial was available to the council members or their staffers at the time the current districts were drawn, as all of this evidence was compiled after the implementation of current districts.[46] This evidence and related trial testimony, because of its *ex post facto* assembly and presentation, should not have been considered as a proper rationalization for the current district boundaries or in determining whether the district was a "narrowly-tailored" remedy to past discrimination. See Bush, 517 U.S. at 966-967.

A review of the objective evidence provided by the current and earlier districting proposals and districting schemes clearly reveal that the current District 3 is by far the least compact councilmanic district either adopted or even proposed in the Parish's recent history.[47] The Supreme Court

---

[46] See Defendants' Exhibits 152, 153, 154, 160, 161 and 167.

[47] See Appendix F, p. A-76, various maps.

has ruled that such districts cannot pass constitutional muster, holding that:

> "As we have noted before § 2 does not require a State to create, on predominantly racial lines a district that is not "reasonably compact." In Johnson v. De Gandy, 512 U.S. 997, 1008 (1994) (other citations omitted). And the § 2 compactness inquiry should take into account "traditional districting principles such as maintaining community of interests and traditional boundaries." Abrams v. Johnson, 521 U.S. 74 (1997) (citations omitted).

Insofar as the lower courts have accepted the Parish's "geographic realities"[48] as a rationalization for the irregular shape of the current District 3, it is absolutely obvious, when viewing the districting plan, that the internal boundaries separating areas of black and white population into separate districts are much more irregular than Parish's geography.[49]

The DeWitt v. Wilson case, 856 F.Supp. 1409 (E.D. Ca. 1994), often cited by the Defendants and the DOJ in their defense of the current District 3, specifically rejects districts drawn in the manner of District 3. DeWitt requires compact majority-minority districts which respect traditional

---

[48] See Appendix D, p. ___.

[49] See Appendix F, p. A-76 various maps. See also Ward, p. 49 (Witness does not deny calling the current District 3 a "racial gerrymander" in a public council meeting), DeViney, p. 19 (This witness referred to the district as a racial gerrymander, and found the current plan to be "offensive."), Hughes, p 89-90, Giardina, p. 56 (Admits to calling the district a "racial gerrymander.").

districting principles, and its holding pointedly rejects "snake-like" land bridges that are very similar in description to the land bridges used in District 3 to connect settlements of black populations located in Kenner, Bridge City, Grand Isle, Marrero, and Harvey, which were admitted by the Parish to have been created by the splitting of established voter precincts solely to enhance the BVAP majority of District 3.[50]

Educated by Bush v. Vera, the defendants and the DOJ attempted to use "politics" to hide the fact that District 3 was gerrymandered for a predominantly racial reason, *i.e.*, to meet the Miller v. Johnson-like demands of the DOJ and of the EJC plaintiffs to maximize the BVAP. The lower court unaccountably "bought" this tactic. But after granting certiorari, this Court can see the clear record evidence that the configuration of District 3 was the result of forbidden racial motivations.

ARGUMENT 3

District 3 is not a narrowly-tailored remedy to any Section 2 violation found in the Parish of Jefferson, and should not survive an objective and proper examination under strict scrutiny.

The Fifth Circuit should have strictly scrutinized the current districting plans; had the current plan been examined under that exacting standard, it is respectfully submitted that

---

[50] Appendix G, p. A-86. See also Gandolfi, p. 76, 77, 78, 79, 81-82, 89, 116, 121, 151-152, 161-162; Hughes, p. 87, 89-90, 103-104; Duker, p. 13, 14; Hooper, p. 26; and Giardina, p. 8, 29.

it could not have passed muster. Strict scrutiny applies to challenged election districts where "race for its own sake, and not other districting principles, was the Legislature's dominant controlling rationale in drawing its district lines." Miller v. Johnson, 515 U.S. at 913, and where "the Legislature subordinated traditional race-neutral districting principles...to racial considerations, 515 U.S. at 916. For strict scrutiny to apply, the plaintiffs must prove that other legitimate districting principles were "subordinated" to race. Miller, 515 U.S. at ___. Race must be ". . .the predominant factor motivating the Legislature's redistricting decision," Id. The Fifth Circuit's gloss is:

> "To be narrowly tailored, the remedial district must use race at the expense of traditional political concerns no more than is reasonably necessary to remedy the found wrong. Stated another way, the remedial district must substantially address the violation and not deviate substantially from a hypothetical court-drawn § 2 district for predominantly racial reasons" Clark v. Calhoun County, Miss., 88 F.3d 1392 at 1407, 1408 (5th Cir., 1996).

The EJC trial court's Special Master's Plan was in fact an actual "court-drawn" remedy to the EJC plaintiffs' Section 2 claims. No one can argue that the current plan does not substantially deviate from the sensible remedies provided by the earlier "6-1" format districting plans or by the Special Master's Plan. The wholesale deviations and excessive use of race are exactly the types of racial classifications condemned by the Fifth Circuit in its Clark v. Calhoun County. The Parish's legislative action in creating the current

District 3, with its explicitly admitted racial motivations and excesses, is in violation of this Court's relevant holdings as well as the earlier dictates of the Fifth Circuit's own Calhoun County.

The defendant Parish and the DOJ presented very little evidence at trial to prove their assertion that the current District 3 was drawn to meet a compelling state interest. Where they did attempt to defend the excessive racial considerations in the drawing of the district, their primary justification was that the district was drawn to remedy past state-sponsored discrimination in the general sense. However, it is only state-sponsored discrimination in current voting laws and procedures – of which no evidence was presented in this case – that would be relevant to justify current District 3.[51] None of the witnesses presented by any party testified that there presently existed impediments to the Parish's minority citizens' ability to fully participate in the electoral process. Quite to the contrary, longtime council member and defendant Butch Ward testified that there were no lingering effects of discrimination with regard to the current voting laws and procedures.[52] Further, it was established at trial that there has never been a black-majority district created within the Parish of Jefferson – with even the slightest black voter registration majority – that has failed to elect a black candidate to office from its very inception.[53]

---

[51] See Johnson v. Mortham, 926 F.Supp. 1460, at 1493 (N.D. Fla. 1996).

[52] See Ward, p. 22.

[53] See Ward, p. 42, 43, and Giardina, p. 38 and 60. See also p. 60 of Giardina's testimony where the Theriot trial court in discussing the defendants' counsels' objection to a question states in open court that this issue is "not a seriously contested fact." See

The defendants and the DOJ instead presented very generalized evidence and trial testimony as to current alleged discrimination. Much of it was revealed under cross examination to be poorly researched, admittedly biased in favor of keeping the enhanced black-majority district, or simply "interested" defendants' witnesses' recollections of what they claim to remember seeing on television or reading in the newspaper. Eschewing a proper weighing of this testimony, the trial court erroneously held that the defendants had met their burden and had proved that the challenged district would in fact withstand examination under strict scrutiny,[54] presumably on the grounds that "race-neutrality" had "not yet been achieved in Jefferson Parish at this time."[55] The Fifth Circuit did not address whether the district would survive strict scrutiny, stating that such an analysis was unnecessary in light of its holding that racial considerations were not the predominant factor in the drawing of the challenged district.[56]

The defendant Parish failed to meet its burden as required by the relevant Supreme Court holdings, which hold:

---

also Gelfand, p. 183, 204-205 (a 50.18% BVAP majority provided black voters a "reasonable opportunity" to elect candidates of their choice), Irvin, p. 75-77; Engstrom, p. 195 (50.8% BVAP adequate to elect black candidate) and p. 199-200; Powell, p. 135-136 (white cross-over voting for black candidate exceeds black cross-over vote for white candidate where black candidate makes a serious effort to be elected to office).

[54] Appendix D, p. ___, "Even if it (strict scrutiny) were required, this plan is narrowly tailored to meet a compelling state interest."

[55] Appendix D, p. ___.

[56] Appendix A, p. ___.

"Generalized societal remedying of past discrimination can never meet the Supreme Court's requirement of particularized solutions for specifically identifiable vestiges of past discrimination." Hays v. State, 936 F. Supp. 360, 371 (W.D. La. 1996), quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989).

In light of the above evidence and testimony, this Court should find that the lower courts are in clear error in holding that strict scrutiny shall not apply here, and further, that the trial court was in error in finding District 3 to be a narrowly-tailored remedy which would survive strict scrutiny.

CONCLUSION

Petitioners respectfully urge that this Court grant certiorari so that petitioners on the merits can show that the judgment of the Court of Appeals should be reversed, and that there be a judgment in favor of the plaintiffs, ordering that the Parish of Jefferson councilmanic districts be reapportioned in a manner not predominated by racial considerations.

Respectfully submitted this 17th day of January, 2000.

DOMINIC N. VARRECCHIO
La. Bar Code No.: 19456
1449 Magazine Street
New Orleans, LA 70130
Telephone: (504) 524-8600
Of Counsel

HAYWOOD H. HILLYER III
La. Bar Code No.:6925
Post Office Box 15521
New Orleans, LA 70175-5521
Telephone: (504) 899-0890
Counsel of Record
for Petitioners

Supreme Court, U.S.
FILED
991203 NOV 15 1999
OFFICE OF THE CLERK
No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Dennis Theriot; Ann Rodriguez; Ronald Perrin; Norman A. Ronquille; David J. Dowell; Iris C. Isenmann; Herman J. Carbo; Maplewood Civic Association, Inc.

Petitioners,

v.

Parish of Jefferson, State of Louisiana; T. J. Ward, also known as Butch; Donald Jones; et al.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX I

Haywood H. Hillyer III, La. Bar No. 6925
Attorney-at-Law
P.O. Box 15521
New Orleans, Louisiana 70175-5521
Telephone: (504) 899-0890
Facsimile: (504) 899-4851
Counsel of Record

Of Counsel:
Dominic N. Varrecchio, La. Bar No. 19456
1449 Magazine Street
New Orleans, Louisiana 70130
Telephone: (504) 524-8600

72-98-96

APPENDIX INDEX

Appendix A A-1

Appendix B.....A-30

Appendix C.....A-33

Appendix D.....A-36

Appendix E.....A-71

Appendix F (Color Maps).....A-76

Appendix G.....A-86

Appendix H.....A-90

Appendix I.....A-100

Appendix J.....A-101

Appendix K.....A-117

Appendix L.....A-120

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FILED AUG 17 1999

No. 97-30729

DENNIS THERIOT; ANN RODRIGUEZ; RONALD PERRIN; NORMAN A. RONQUILLE; DAVID J. DOWELL; IRIS C. ISENMANN; HERMAN J. CARBO; MAPLEWOOD CIVIC ASSOCIATION, INC.,

Plaintiffs-Appellants,

versus

PARISH OF JEFFERSON, State of Louisiana; T. J. WARD, also known as Butch; DONALD JONES; EDMOND MUNIZ; NICK GIAMBELLUCA, in his official capacity as member of the Parish Council, Parish of Jefferson, State of Louisiana; TIM COULON, in his official capacity as President of Jefferson Parish; AARON BROUSSARD, in his official capacity as Chairman of the Jefferson Parish Council; LLYOD F. GIARDINA; JOHN LAVARINE, in his official capacity as member of the Jefferson Parish Council;

Defendants-Appellees,

UNITED STATES OF AMERICA; DEPARTMENT OF JUSTICE,

Intervenor Defendants-Appellees,

THE COUNCIL OF THE CITY OF KENNER; TERRY McCARTHY; BETTY BONURA; MARC JOHNSON; JEANNIE BLACK; JOHN LAVARINE, III; MICHELE BRANIGAN; PHIL CAPITANO,

Intervenors-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

Before DAVIS, STEWART, and PARKER, Circuit Judges.

CARL E. STEWART, Circuit Judge:

In this appeal, we must decide whether appellants were entitled to prevail at the bench trial on their claim that the Third Councilmanic District of the Parish of Jefferson is unconstitutional because it results from a racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and of 42 U. S. C. § 1983.

I

A

The Parish of Jefferson ("Jefferson Parish" or the "Parish") is a political subdivision of the State of Louisiana. Pursuant to the Jefferson Parish Home Rule Charter ("Home Rule Charter"), Jefferson Parish is governed by a Parish President and a council that is comprised of seven members. The Jefferson Parish Council (the "Council") is authorized to manage and to operate the Parish government. Jefferson Parish utilizes a majority vote requirement in its councilmanic elections under the terms of its Home Rule Charter.

Since January 1986,[1] several cases pertaining to the constitutionality of Jefferson Parish's councilmanic districts

---

[1]According to the 1980 United States Census, blacks in Jefferson Parish comprised 13.86% of the total population, and 11.78% of the voting age population. Jefferson Parish had a total population of 454,592 persons and a black population of 63,001. The voting age population included 314,323 persons, of whom 268,878 were white and 37,039 were black. There were197,376 registered voters in the Parish of whom 23,381 were black.

have been filed in federal court.[2] In the first case, *Floyd v. Parish of Jefferson*, No. 86-0265 (E.D. La. June 22, 1987), certain Jefferson Parish registered voters filed suit alleging that the structure of the Jefferson Parish councilmanic districts violated the constitutional requirement of one-person, one-vote.[3] The *Floyd* lawsuit terminated with a consent judgment that ordered the Parish to "more evenly distribute the population of the [Parish] among its four councilmanic districts" to ensure compliance with the requisite one-person, one vote principle. The Jefferson Parish Council amended Section 2.02 of the Home Rule Charter to reapportion the population distributions among councilmanic districts. This amendment, embodied in Ordinance No. 16932, was incorporated into the consent judgment and resulted in no district's having a black population in excess of 24%. Overall, the consent decree did not alter the 4-2-1 election scheme.[4] It only required that the Parish reapportion the four single member districts to bring it into compliance with one-person, one-vote principles.

Subsequently, in *East Jefferson Coalition for Leadership and Development v. Parish of Jefferson*, 691 F.Supp. 991 (E.D. La. 1988), voting rights organizations and

---

[2] Pursuant to 1957 revisions to the Jefferson Parish Home Rule Charter, a seven-member Council functions as the legislative and policy-making body of the Parish. The Parish President acts as the chief administrative officer. For purposes of representation, initially the Parish was divided into four council districts, each of which elected a single council member. Two "super-districts," one consisting of Districts 1 and 2 and a second consisting of Districts 3 and 4, each elected an additional council member. The seventh council member was elected from the Parish at-large. This plan was commonly referred to as the "4-2-1 plan."

[3] See Reynolds v. Sims, 377 U.S. 533 (1964) (establishing one-person, one-vote principle).

[4] See *supra* note 2.

individual registered voters brought an action against the Parish alleging that the 4-2-1 plan violated Section 2 of the Voting Rights Act of 1965, as amended in 1982, 42 U.S.C. § 1973 *et seq.*, and their rights under the Fourteenth and Fifteenth Amendments to the United States Constitution, and § 1983. Specifically, the plaintiffs complained that the then-existing electoral system in Jefferson Parish diluted black voting strength. After a bench trial, the district court ruled that "the minority group is sufficiently large and geographically compact to constitute a majority within a single-member district."[5] The district court also found that the black residents of Jefferson Parish were politically cohesive, *see id.* at 1006, and that the Parish's electoral system impeded the ability of minority voters to elect representatives of their choice. *See id.* at 1001. The court rejected a proposed black-majority district and ordered the parties to submit alternative plans.

On February 16, 1990, the parties adopted a plan which included six single-member districts and one at-large district ("February 1990 Plan"). The district court subsequently approved the plan. Of the single member districts, District 3 contained a black majority with a total black population of 51.7%, according to the 1980 Census, and 56.3% black voter registration. On May 10, 1990, the Attorney General precleared this plan under Section 5 of the Voting

---

[5] The district court, invoking FED. R. CIV. P. 52(b), amended its prior finding that blacks were widely dispersed throughout the district and ruled that "the minority group is sufficiently large and geographically compact to costitute a majority within a single-member district." *East Jefferson Coalition for Leadership v. Parish of Jefferson*, 926 F.2d 487, 491 (5th Cir. 1991).

Rights Act.[6] The Department of Justice ("DOJ") precleared the Parish's alternative plan. On appeal, the Parish challenged the district court's findings that the minority group was sufficiently large and geographically compact to constitute a single-member district; that the minority group is politically cohesive; and that a bloc voting white majority usually defeats the minority's preferred candidate. *See Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986) (establishing theses[sic] as the three necessary preconditions to make a claim under § 2 of the Voting Rights Act).[7] This court affirmed and remanded for implementation of the February 1990 Plan. *See East Jefferson Coalition for Leadership & Dev. v. Parish of Jefferson ("EJC")*, 926 F.2d 487, 494 (5th Cir. 1991).

B

After remand from this court, the district court held a status conference stating that the Feb. 1990 plan had to be modified to be in accord with the population variances triggered by the 1990 Census.[8] The 1990 Census reflected an increase in the black voting-age population ("BVAP"). Moreover, since District 3 had lost population overall, it required reconfiguration to avoid a constitutional one-

[6] Section 5 of the Voting Rights Act requires that any change in a standard, practice, or procedure with respect to voting by a "covered jurisdiction" be submitted to the United States Attorney General for prior approval or "preclearance." 42 U.S.C. § 1973c; 28 C.F.R. § 51.1 *et seq.* (1989).

[7] *See generally*, Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies*, 33 HARV. C.R.-C.L. L. REV. 333, 343-46 (1998) (discussing section 2 of the Voting Rights Act and the Gingles preconditions).

[8] According to the 1990 Census, 448,306 people reside in Jefferson Parish, of whom 331,894 (74.0%) are white and 78,263) (17.5%) are black. These figures represent a 3.6% increase in the black population since the 1980 census although the overall population of the Parish decreased by approximately 6,300 people.

person, one-vote violation. The DOJ informed the attorneys for Jefferson Parish that it would require a benchmark, or a minimum 52.3% BVAP majority in District 3 in order to pre-clear a new redistricting plan drawn under the 1990 Census. The district court encouraged the parties to work together to formulate the necessary modifications and to adhere to a May 15, 1991 deadline for submission of the modified plan.

During the subsequent meetings among the Parish council members, each councilman brought certain political concerns to the attention of other councilpersons. One or more of the individual incumbent council members sought to include in their districts voters who could be expected to support them in a bid to gain reelection. Additionally, the Parish sought to avoid contests between incumbent council members. In this regard, District 2 also received significant attention because it was likely to feature a race between incumbent councilmen James Lawson and Lloyd Giardina.

During the ensuing negotiations, a number of proposals surfaced among the council members. Councilman James Lawson's plan (the "Lawson Plan" or "modified plan") garnered the most support because it permitted other incumbents to maintain as much of their pre-1988 districts as possible. It retained the six-and-one councilmanic scheme, with six single-member councilmanic districts and one at-large seat ("6-1"). Additional adjustments were made to accommodate a particularly vocal constituent, Ida Saik, a resident of Maplewood.[9] The Lawson Plan split some pre-

[9] Ms. Ida Saik was the only Jefferson Parish resident who voiced her concerns to Councilperson T. J. Ward regarding the challenged redistricting plan during the 1991 negotiation process and through the time before the challenged plan was adopted by the Parish Council. Ms. Saik adamantly expressed her views and frequently contacted councilpersons to ensure that her concerns were reflected in the final proposal.

cincts to accommodate changes in the numbers of registered voters[10] and included a black majority councilmanic district, District 3, with a BVAP of 57.40%. By resolution No. 69122, passed on May 8, 1991, the Jefferson Parish Council adopted the modified plan. All of the council members, with the exception of Giardina, voted in favor of the modified plan.

On May 15, 1991, Jefferson Parish filed the modified plan with the district court but the district court rejected the modified plan and admonished the parties for letting "politics" enter the districting process. The district court appointed a special master to draw up a redistricting proposal for the court. On June 10, 1991, the special master submitted a 6-1 redistricting plan to the district court containing a black councilmanic district with 49% BVAP, a BVAP percentage less than the BVAP adopted in the Lawson plan. The trial court entered its judgment implementing the redistricting plan drawn by the special master but a panel of this court, in an unpublished *per curiam* opinion, found that the plan was a "Judge Made Plan" and impermissibly intruded "into the bailiwick of the legislative branch of local governments."

This court further found that the special master's plan "must fall for failure to include one district with a majority black voting age population." We held that the district court "should promptly adopt and implement a plan that, while applying the 1990 census data, otherwise remains as faithful as practicable to 'the' Plan, including a black voting age majority in District No. 3." This court also approved the

[10] Jefferson Parish had often been required to split precincts prior to the 1991 redistricting of its Parish Council in order to accommodate changes in the numbers of registered voters in particular voting precincts or changes in State House and Senate district lines.

modified redistricting plan submitted by the Jefferson Parish Council and instructed the trial court to issue an injunction directing the Parish to submit the modified plan to the DOJ for expedited review under section 5 of the Voting Rights Act. Thereafter, pursuant to our instructions, the district court was to order the implementation of the modified plan immediately upon receipt of the notice of pre-clearance.

After our decision and the district court's subsequent judgment revoking its previous judgment and ordering the Parish to submit the modified plan for preclearance, the Parish Council complied. The Parish Council submitted the modified plan to the DOJ by letter dated August 15, 1991.[11] The DOJ responded on August 27, 1991, in a letter which stated that the Attorney General did not interpose any objection to the specified change. The first elections using the modified plan were held in 1991. Two African-American candidates advanced to the run-off in District 3, and Donald R. Jones was elected to the Parish Council.[12]

C

On July 28, 1995, Dennis Theriot and six other registered voters in District 3, along with the Maplewood Civic Association (collectively, the "Appellants"), brought suit against the Parish and Parish Council officials challenging the configuration of District 3. The Appellants deemed

[11] Again, the modified plan included a seven-member Parish Council comprised of six single-member districts and one at-large district. The black majority councilmanic district included a black voting age population of 57.4% under the 1990 Decennial Census.

[12] Donald R. Jones's election as the council representative for District 3 marked the first time this century that an African-American was elected to the Jefferson Parish Council. He successfully ran for re-election in 1995.

District 3 a racial gerrymander in violation of the Fourteenth and Fifteenth Amendments to the Constitution, and the Voting Rights Act of 1965, 42 U.S.C. §§ 1973 *et seq.* (1994). The Appellants argued that their political voice was diluted by the fact that the Maplewood community is divided between District 3, represented by Councilperson Jones, and District 1, represented by Councilperson Ward. [13] In May 1996, the district court permitted the United States, the City of Kenner and various other Kenner officials to intervene to defend the plan.[14] After discovery and extensive motion practice, Judge Stanwood R. Duval, Jr., conducted a bench trial from March 10, 1997 to March 12, 1997. On April 25, 1997, he entered judgment for the Defendants.

The district court made findings of fact and drew conclusions of law. Factually, the district court found that political incumbency "drove the pencil" in designing District 3. One-person and one-vote considerations were paramount in configuring District 3 which the district court determined was sufficiently compact. In its discussion of compactness and contiguity, the district court described the geography of the Parish and the location of predominantly black communities within the Parish. The district court further found that the Parish was not unaccustomed to splitting districts in order to achieve political goals. The district court identified communities of interest within District 3 and found that an increase in the BVAP justified using a 52.3%

[13]Both councilpersons have supported programs in and beneficial to Maplewood.

[14]The Kenner Defendants intervened in this lawsuit to assert their interest in the continued three-way split of Kenner and Kenner residents' access to and influence over three council members elected from single-member districts and one council member elected at large.

benchmark for determining retrogression under Section 5 of the Voting Rights Act. Finally, the district court found, as a matter of fact, that vestiges of discrimination remain in Jefferson Parish.

As a matter of law, the district court held that the Appellants failed to carry their burden of proof regarding the predominance of race in the configuration of District 3. Consequently, the district court declined to apply strict scrutiny. The shape of the district, according to the district court, did not demonstrate circumstantially that race motivated the form of the district because District 3 was not configured to appear similar to a "Rorschac ink-blot;" "a bug splattered on a windshield;" or "a sacred Mayan bird." In short, because District 3 does not wind in a serpentine fashion, the district court found that it did not have any of the visual indices apparently obvious in in *Hays v. State of Louisiana*, 515 U.S. 737 (1995), *Miller v. Johnson*, 515 U.S. 900 (1995); and *Shaw v. Reno*, 509 U.S. 630 (1993)("Shaw I").

The district court further held that since it had determined that strict scrutiny did not apply and that no constitutional violation had occurred, no harm resulted in re-evaluating the issues in light of *Shaw* I and its progeny. In its conclusion, the district court emphasized that strict scrutiny did not apply yet explained that, even if it did, District 3 is narrowly tailored to meet a compelling State interest.

The district court denied Appellants' subsequent motions for a new trial or otherwise alter the judgment of the district court. On July 15, 1997, Appellants timely appealed the district court's judgment.

Appellants raise six issues on appeal.[15] We seek to determine whether the district court erred in (1) ruling that race did not predominate in the creation of the current District 3; (2) declining to apply strict scrutiny to the legislative act creating District 3; (3) ruling that a 52.3% black-voting age population was required in order to avoid a section 5 retrogression violation; (4) admitting and relying upon evidence pertaining to community-of-interest testimony and data assembled after the actual drawing of the districts; (5) making certain factual findings predicated on its assessment of witness credibility; and (6) granting defendants' motion to quash the depositions of counsel, Harry Rosenberg and M. Nan Alessandra.[16]

A

Appellants bear the burden of proving an impermissible racial classification. *See Miller v. Johnson*, 515 U.S.

---

[15] During our adjudication of this matter, the Supreme Court issued its decision in *Hunt v. Cromartie*, 119 S.Ct. 1545 (1999). In *Hunt*, the Supreme Court addressed a challenge to North Carolina's Twelfth Congressional District as the product of unconstitutional racial gerrymandering. The Court held that it was an error for the district court to resolve the disputed fact of intent at the summary judgment stage. Substantively, *Hunt* is most instructive in those instances where voting rights challenges have been resolved after adjudicating a dispositive motion. In that regard, the posture of this case significantly differs from *Hunt*. The district court's resolution of the issues in this case occurred in the context of a three-day trial during which 55 exhibits were introduced and 22 witnesses testified.

[16] As we turn to the merits of these issues, we are mindful of our decision in *EJC*, affirming the district court's finding that the Parish's electoral voting scheme violated Section 2 of the Voting Rights Act. *See EJC*, 926 F.2d at 487. Because of the need to remedy the Section 2 violation, race was considered in drawing a plan with a majority-minority district. The relevance or consideration of race does not mandate a finding that race predominated.

900, 916 (1995). Appellants may rely upon circumstantial evidence of the district's shape and demographics or more direct evidence bearing upon legislative purpose. *See id.* The district court found that "traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual and shared interests," *see id.* at 916, were not subordinated to race in drawing District 3. We review the district court's determination that race did not predominate for clear error. *See Miller*, 515 U.S. at 917, see also *Shaw v. Hunt*, 517, U.S. 899, 905 (1996) (Shaw II). It is well settled that "[a] finding is 'clearly erroneous' when [,] although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City,* 470 U.S. 564, 573 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

In an effort to manufacture clear error, Appellants challenge every aspect of the district court's opinion. They contend that testimony regarding the drawing of the current districts, the documentary evidence in the record, the shape of District 3, and the racial geography within the Parish provides direct and circumstantial evidence of an impermissible racial classification. We disagree. The record reveals no clear error inasmuch as incumbency protection, maintaining communities of interest, addressing one-person, one-vote concerns and natural geographic conditions predominated in drawing District 3.

1.

In *Bush v. Vera*, 517 U.S. 952 (1996) (plurality opinion), the Supreme Court recognized, "[i]n some circumstances, incumbency protection might explain as well

as, or better than, race a State's decision to depart from other traditional districting principles, such as compactness, in the drawing of bizarre district lines." *Id.* at 967. Much of the discussion among the Parish Council members during the 1991 redistricting negotiations with the *EJC* plantiffs centered on political concerns, particularly the likelihood that councilpersons Lawson and Giardina would each campaign for the single District 2 council seat. Each councilperson brought certain additional political and incumbency concerns to the negotiation process. Although the Lawson Plan resulted in a race between Lawson and Giardina in District 2, it garnered the most support because it met the political and incumbency concerns of the majority of existing councilpersons.

The record indicates that Councilperson Ward preferred the Lawson Plan because it resulted in fewer changes to his district, District 1. Councilperson Larry Hooper sought to maintain as much of his pre-1988 district as possible, particularly the communities of Kenner and River Ridge. He also voted for the Lawson plan. Councilperson Robert B. Evans, Jr. received no adverse comments from Parish residents concerning the adoption of the Lawson Plan and ultimately joined five other councilpersons in voting to adopt the plan. Councilperson Edmond Muniz similarly determined that the Lawson Plan was politically advantageous and improved his prospects for re-election. While this court's previous finding of a Section 2 violation required the Parish to redraw its districts, we find that the issue of race was plainly subordinate to the majority of the councilpersons' preoccupation with protecting incumbency and main-

taining other political advantages.[17]

We offer some examples of the testimony we found common throughout the proceedings and which support both the district court and our findings. Councilman Giardina testified:

Q. Was race the primary consideration in the drawing of the current district three?

A. The current district three?

Q. Yeah, primary?

A. Or the current district two?

Q. Current district three.

A. You can't answer one without the other, they go together.

THE COURT: Just answer the question as to district three right now and you can explain your answer.

THE WITNESS: I don't think so ... and the reason I'm saying I don't think so is because if you drew one district it related to the other district, you couldn't draw just district three [;] you had to draw six districts.

(Tr., Vol. 1, at 34). Later, Councilman Giardina testified on the relevance of politics:

---

[17]Indeed, the residents of Kenner sought to intervene in this case in order to maintain a tripartite split of its community and the attendant ability to exert political influence in at least three districts.

Q. Let me go back to the districting process inolved[sic][;], did politics govern that process in your opinion?

A. It was the prevailing factor.

(Tr., Vol. I, at 43). In subsequent testimony, Councilman Giardina acknowledged the benefit the Lawson Plan offered to incumbent council members:

Q. That preference to keep their optimum areas was the driving force in their voting for the redistricting configuration that we have today, is that right?

A. That's absolutely right.

(Tr., Vol. 1, at 51).

Equally compelling is the testimony of Councilman Lawson:

Q. Isn't it a fact that in making the current districts you were trying to maximize the black-voter population of District.31?

A. I was trying to address the concerns of all Councilmen, you know. Bob Deviney would call me. Hooper would call me. Muniz would call me. "Butch" would call. Everybody was calling me and saying, "Look, Jim -"

MR. VARRECCHIO: Your Honor, that's not responsive.

THE WITNESS: "I want to make sure it's in here or there," so I was drawing a district that would address everyone's concerns, and this is what came out of it.

Q. I want to talk to you about District 3.....Isn't it a fact that you were trying to maximize the black population of District 3?

A. I think what I was trying to do was simply draw a district that I make sure of my incumbency that I could run in and at the same time make sure I had the right numbers of people in each council district.

(Tr., Vol. XVIII, at 87). Still not satisfied with Councilman Lawson's response, opposing counsel later asked essentially the same question again:

Q. Okay. In drawing the current District 3, would it be fair to say that race was your primary consideration in drawing its boundaries?

A. No ... I mean, I was looking to try to retain as much [of] my old district as possible.

(Tr., Vol. XVIII, at 125). Our review of the record leads us to conclude that the inclusion or exclusion of communities was inexorably tied to issues of

incumbency.[18]

2.

Like the district court, we also find that District 3 is composed of communities of interest.[19] In *Miller*, the Court held that "a State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests." *Miller,* Miller, 515 U.S. at 920. States, however, may

[18]We distinguish this case from *Miller v. Johnson*, 515 U.S. 900 (1995). In *Miller*, the Court struck down Georgia's Eleventh Congressional District after finding that race was the predominating factor. *See Miller*, 515 U.S. at 918. The Court reached its decision with relative ease given concessions by the State of Georgia and evidence revealing the DOJ's insistence on certain racebased revisions to Georgia's redistricting plan. *See id.* at 917-18. The Court found that the State of Georgia had acquiesced to the DOJ's "maximization agenda"which the DOJ had made clear through its letters objecting to proposed districts and by three preclearance rounds. *See id.* at 917. Additionally, the State of Georgia conceded that it added certain communities and split other communities with the main objective of increasing the black population of the Eleventh Congressional District. *See id.* at 918.

Stated simply, there was no proverbial big brother manipulating the process of drawing the districts. The Parish did not abdicate its responsibilities to the DOJ or confront pressure to include or exclude communities. When requested, the DOJ properly advised the Parish of a benchmark under Section 5 of the Voting Rights Act. Nevertheless, among other evidence, Appellants highlight Parish Council research staffer Gandolfi's letter to the DOJ explaining that particular precincts were split to enhance both the black population and the BVAP of District 3. Yet at trial, even Gandolfi concluded that political considerations were paramount in the design of the Lawson plan.

[19] In this section, we also address the merits of Appellants' fourth issue: whether the district court erred in admitting evidence bearing upon communities of interest. Again, we find no clear error.

not engage in racial stereotyping, that is, assuming that the voters of the same race "think alike," share the same political interests, and prefer the same candidates. *See id.* (explaining that racial stereotyping is at odds with equal protection mandates). The same logic applies to Jefferson Parish.

The record indicates that the neighborhoods and subdivisions that now make up District 3 contain low-income residents who are less-educated, more often unemployed, and more poorly-housed than voters in other districts.[20] District 3 residents have common social and economic needs. *See Lawyer v. Department of Justice*, 521 U.S. 567, 581 (1997) (finding a community of interests as predominantly urban and low-income even though the district crossed the Tampa Bay). Given the common thread which binds the black voters within District 3, they "are entitled to an effective voice in the electoral process and to an influence over the outcome of elections." *See East Jefferson Coalition for Leadership and Development v. Parish of Jefferson*, 691

---

[20]A plethora of civic and community organizations dedicated to addressing issues of housing, education and poverty exist within Jefferson Parish and District 3. Political organizations whose members are predominantly black existed in Jefferson Parish as early as the 1940s. Generally these groups draw their memberships from Kenner, Bunche Village, Little Farms, Lincoln Manor, and other predominantly black neighborhoods on the East Bank. These organizations also have drawn support from Marrero, Avondale, Harvey, and other black neighborhoods located on the West Bank. Since their inception, some of these organizations have lobbied for paved streets and water and sewer lines. Others were organized to improve recreation facilities, reduce traffic, combat crime and drugs, and improve drainage. Razing dilapidated housing emerged as a focal point for another organization. Many of these social ills continue to infect the communities making up District 3.

F. Supp. 991, 1008 (E.D. La. 1988).

Additionally, we reject Appellants' argument that information pertaining to the socioeconomic conditions of the Parish was not properly before the district court since the data was not available to the councilpersons at the time they drew the districts. Appellants rely on the Supreme Court's decision in *Vera*. There the Court refused to overturn the district court's finding that race predominated over other traditional redistricting principles particularly since the State of Texas's supporting data was not available to the Legislature in any organized fashion before the challenged district was created. *See Vera*, 517 U.S. at 966. The Court also held that the State was not required to compile a comprehensive administrative record and courts are not required to dismiss facts not explicitly mentioned in the redistricting plan's legislative history. *See Vera*, 517 U.S. at 966.

We find that the issues facing Jefferson Parish, including those that affect citizens who reside in the current District 3, are not new; rather they are remnants of the historical subjugation of blacks in the State of Louisiana and in Jefferson Parish. Indeed, evidence concerning the socio-economic conditions of the Parish's neighborhoods and subdivisions was produced in the preceding *EJC* litigation, see e.g., *EJC*, 926 F.2d at 490 (exploring issues of political cohesion), as well as in this case. Many of the same councilpersons were involved in the preceding litigation and are well aware of the socio-economic conditions throughout Jefferson Parish.

We similarly decline to find clear error in the district court's determination that overwhelming evidence demonstrated that one-person, one-vote considerations were para-

mount in configuring the districts. The one-person, one-vote provision requires districts to achieve population equality "as nearly as is practicable." *Abrams v. Johnson*, 521 U.S. 74, 98 (1997). The record includes the testimony of Kenneth Hughes, the Director of the Council's Research and Budget Staff, and Alan Gandolfi, a research analyst and staff attorney. Both testified that one-person, one-vote considerations emerged as their primary concern while working on the various redistricting plans. Additionally, the record reveals a cause and effect relationship between Lawson's efforts to include politically advantageous communities in District 2 and alterations to the boundaries of District 3 to satisfy one-person, one vote requirements. Overall, we find that the district court's conclusion that one-person, one-vote concerns were paramount is fully supported by the record.

4.

Geographically, the district court found that the past redistricting tradition in Jefferson Parish did not strictly adhere to geometric standards of compactness. According to the district court, the "very irregular" geography and topography of the Parish (including the fact that it is 50% water) substantially limits the ability of the Parish to adhere to such standards. Consequently, the district court rejected Appellants' assertion that the District was bizarre on its face.[21] We agree and find that any irregularity associated with the shape of District 3 is derivative of politics, joining communities of interest, one-person, one-vote concerns, and

[21] The district appears "V" in shape.

the geography and population distribution in the Parish.[22] With regard to geography and demographics, it is most apparent that the black population resides in an east-west direction, as opposed to north-south. Consequently, remedying the Section 2 violation required a district which, in some measure, proceeded in an east-west direction rather than the usual north-south direction.

5.

In short we are not persuaded that the district court erred in finding that race did not predominate in drawing District 3. The record presents bountiful evidence supporting the district court's finding that political incumbency, communities of interest, one-person, one-vote, and geography dwarf issues pertaining to race. We find particularly relevant the following colloquy between the court and Mr. Gandolfi:

THE COURT: To some extent, right down to this case, to some extent, if you look at the shape of these districts, certainly race had some thing to do with the shape you adopted?

THE WITNESS: Certainly, we had to maintain that majority black.

THE COURT: To some extent, one man one vote dicates the shape?

THE WITNESS: Right.

THE COURT: And to some extent, the geographical boundary of the Parish dictates the shape?

[22] Like the district court, we disregard the division or splitting of unpopulated precincts to ensure contiguous districts because no communities of interests were affected.

THE WITNESS: To a great extent.

THE COURT: And to some extent incumbency and political concerns dictate the shape?

THE WITNESS: I would say of the four criteria you just mentioned, the last one, the political concerns had the most effect on exactly how those other three goals were achieved. There were different ways of doing it. (Tr., Vol. 1, at 147).

Appellants implicitly argue that *any* consideration of race, even where such consideration is *de minimis*, mandates a finding that race predominates. This implication or argument has been squarely rejected by *Miller, Vera, Abrams* and the *EJC* litigation; therefore, we cannot agree.[23] Issues of race were relevant, inasmuch as the Parish Council was directed to remedy a Section 2 violation, yet did not predominate.

B

Strict scrutiny analysis is required when a plaintiff proves that race is the "predominant factor" motivating a redistricting decision. See *Miller*, 515 U.S. at 920. The Supreme Court has recognized that "[s]trict scrutiny does not apply merely because redistricting is performed with consciousness of race .... Nor does it apply to all cases of intentional creation of majority-minority districts." *Bush*, 517 U.S. at 958. In like manner, this court has opined that "strict scruti-

[23] If we were to follow Appellants' argument to its logical conclusion, no court could find or ever require any jurisdiction to address a Section 2 violation because race emerges as a relevant issue. Indeed, much of Appellants' argument appears designed collaterally to attack this court's previous finding of a Section 2 violation.

ny does not apply to all cases involving the intentional creation of majority-minority districts." *Clark v. Calhoun County, Miss.*, 88 F.3d 1393, 1404 (5th Cir. 1996). Race is inherently a consideration where, as here, a governing body must respond to violations of Section 2 of the Voting Rights Act. *See id.* at 1407.

Had the Appellants demonstrated that race was the predominant factor, the burden would have been on the Parish to demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest. See *Miller*, 515 U.S. at 920. Again, the Appellants have failed to demonstrate that race predominated, a prerequisite for strict scrutiny analysis. In an abundance of caution, the district court discussed the merits of this issue; we decline to follow a similar course and turn our attention to the next issue, avoiding a Section 5 retrogression violation.

C

Jefferson Parish is covered by Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Consequently, the Parish may not "enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," unless it secures preclearance. Preclearance is achieved in one of two ways, filing a declaratory judgment action in the United States District Court for the District of Columbia or submitting the change to the United States Attorney General. In either forum, it is incumbent upon the Parish, or submitting jurisdiction, to prove that the voting change does not have a discriminatory purpose or effect. Changes which have not been pre-cleared are unenforceable. *See* 42 U.S.C. § 1973c; *Clark v. Roemer,*

500 U.S. 646 (1991).

In *Beer v. United States*, 425 U.S. 130, 141 (1976), the Court held that a voting change may not be pre-cleared if it "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." Retrogression occurs when "the ability of minority groups to participate in the political process and to elect their choices to office is augmented, diminished, or not affected by the change affecting voting." *Id.* at 141. Generally, a determination of retrogression requires a comparison between the proposed voting change and the last legally enforceable practice or procedure used by the jurisdiction. *See* 28 C.F.R. 51.54 (b)(1) (1999). The latter is commonly referred to as a benchmark.

The district court found, as a matter of fact, that Jefferson Parish was justified in using 52.3% BVAP as the appropriate benchmark for determining retrogression under Section 5. The district court based its determination on the increase in the black population in District 3 under the findings of the 1990 Census. While the Lawson Plan overshot the benchmark by nearly 5 percentage points, the district court found that the Appellants had not demonstrated that the DOJ coerced the Parish into designing a district that maximizes District 3's black population as criticized in *Miller*. We review the district court's findings of fact for clear error and find none. *See* FED. R. Civ. P. 52(a).

We reject the Appellants' reliance on *Abrams* and *Young v. Fordice*, 520 U.S. 273 (1997) to argue that only the last districting scheme used by the jurisdiction to hold elections is the proper benchmark. Appellants have misread both

cases.[24] In *Abrams*, the Supreme Court rejected appellants' proposed benchmark because it had never been in effect and was found to be unconstitutional. *See Abrams, 521 U.S.* U.S. at 96-97. The plan for unitary voter registration for state and federal elections at issue in *Young* suffered similar deficiencies. Specifically, the Court found that the plan was not "in force or effect" because those seeking to administer the plan had abandoned it as soon as its unlawfulness became apparent.

Appellants' invitation to disregard census data in favor of outdated information is impractical. The parties realized the 1990 Census would impact redistricting; therefore, they promulgated an interim plan. Once the 1990 Census provided figures which were not favorable to the Appellants, they sought to disregard its import. Nevertheless, the interim plan was pre-cleared and upheld by the court. A majority-minority district which fell below the documented increase in the BVAP would have been subject to a Section 2 challenge.

By insisting on benchmark figures wholly inconsistent with increases in the BVAP, Appellants attempt to sentence minorities complaining of vote-dilution to a fate sim-

[24] Appellants read these cases as requiring the district court to use the last districting scheme used by the jurisdiction to hold elections as the proper benchmark. Accordingly, Appellants reject the March 1990 interim districting plan as establishing the benchmark. Instead, Appellants never disclose what the benchmark should have been, but seem to suggest that 46% was the proper benchmark. Appellants deem "ameliorative" all of the post-1990 Census "6-1 " plans and argue that the post-1990 Census plans violate Supreme Court precedent because the DOJ forced the Parish Council to adopt a plan with maximum benefits to minority voters. To substantiate its argument, Appellants exaggerate and misconstrue the nature of the communications between the DOJ and the Parish Council.

ilar to Sisyphus .[25] Even though this court has found a Section 2 violation and required the parties to make adjustments based on the 1990 Census, Appellants would have us turn the Appellees away and have them prove a Section 2 violation all over again. We decline to impose such a requirement. Once a litigant has demonstrated vote dilution and the court has directed redress, the litigant need not prove vote dilution once again before a court can assess the merits of the proposed remedy. Otherwise, it is conceivable that courts may never reach the merits of the proposed remedy. Appellants have failed to demonstrate clear error. Again, we are satisfied that to the extent the current District 3 exceeds the benchmark, political incumbency and other political concerns were the driving force.

D

Appellants argue that the trial court erred in deciding which witnesses to credit and which to discount at trial. Factual findings from a bench trial are reviewed under the clearly erroneous standard. *See Odum v. Frank*, 3 F.3d 839 (5th Cir. 1993); FED. R. Civ. P. RULE 52(a). A finding is clearly erroneous when despite evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been committed. *See Cupit v. McClanahan Contractors. Inc.*, 1 F.3d 346, 348 (5th Cir. 1993). We conduct our review to determine whether the district court's account of the evidence is plausible in light of the record. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985). Where the evidence can support find-

[25] Zeus sentenced Sisyphus, the mythical King of Corinth, to an eternity in Hades trying to push a boulder uphill to the top. Yet every time Sisyphus neared the crest, the weight of the rock would turn it back and the rock would rol back towards the plain. ***See*** Homer, The ODYSSEY,(E.V. Rieu & D.C. H. Rieu trans., Penguin Classics 1991).

ings either way, a choice by the trial judge between two permissible views of the weight of the evidence is not clearly erroneous. *See id.*

The burden of showing that the findings of a district court are clearly erroneous is heavier if credibility of witnesses is a factor in the district court's determination. *See Coury v. Prot,* 85 F.3d 244, 254 (5th Cir. 1996). A trial court's decision to credit the testimony of one, two, or more witnesses, each of whom has told a coherent, facially-plausible story that is not contradicted by extrinsic evidence, and can virtually never be clear error. *See Justiss Oil Co., Inc. v. Kerr-McGee Refining Corp.,* 75 F.3d 1057 (5th Cir. 1996). Appellants' argument fails to surpass the standard of review under clear error. As opposed to directing this court's attention to extrinsic evidence, Appellants use positive adjectives to describe beneficial testimony and negative adjectives to describe unfavorable testimony. However, the district court's analysis turns on choosing between plausible alternatives and Appellants have failed to show clear error in this regard. This court declines to depart from the district court's assessment of the credibility of the witnesses except in the rarest of circumstances. *See Travelers Indem. Co. v. Clavert Fire Ins. Co.,* 798 F.2d 826, 836 (5th Cir. 1986). We have reviewed the record and are satisfied that the evidence supports the district court's assessment of witness credibility.

E

We review a district court's decision denying discovery, including quashing deposition subpoenas, for abuse of discretion. *See Tiberi v. CIGNA Ins. Co.*, 40 F.3d 110,112

(5th Cir. 1994); *see also Hastings v. N. E. Indep. Sch. Dist.*, 615 F.2d 628 (5th Cir. 1980).

The magistrate judge rejected the Appellants' argument that they were entitled to take the depositions of defendants' trial attorneys, Harry Rosenberg and M. Nan Alessandra. The magistrate judge found that "plaintiff-intervenor's [Cleta White] premise that defendant's attorneys are the only persons with information about how or why redistricting or a remedy occurred is rank speculation hovering near the absurd." In like manner, the district court rejected this argument. Nevertheless, the district court did provide the Appellants with an alternative to deposing the Parish's attorneys, by stating that "the record in this case is voluminous and presents a more than adequate alternative source for the proof intervenor's counsel seeks to meet the standard of *Miller*."

Notwithstanding Appellants' reference to material outside the record, Appellants have not met the high standard for demonstrating abuse of discretion.[26] The entire record in the *EJC* case was available to the parties in this litigation. Moreover, the district court referred the Appellants to John Tanner of the DOJ as the person who would have the best knowledge and information regarding the sought information. Deposing Rosenberg and Alessandra was also complicated by the fact that they were counsel for the opposing side. Generally, federal courts have disfavored the practice of taking the deposition of a party's attorney; instead, the practice should be employed only in limited circumstances.

[26]An appellate court may not consider new evidence furnished for the first time on appeal and may not consider facts which were not before the district court at the time of the challenged ruling. *See Great Plains Equip.. Inc. v. Koch Gathering Sys.. Inc.*, 45 F.3d 962 (5th Cir. 1995).

See Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986). Given the alternatives and Appellants' failure to demonstrate abuse of discretion, this claim must fail.

Resolution of this case turns on the issue of whether race predominated in the redistricting plan. Like the district court before us, we cannot find that race predominated. While relevant, issues pertaining to race were subordinated to concerns for political incumbency, joining communities of interest, satisfying one-person, one-vote requirements, and geographical realities. Since the Appellants fail to demonstrate that race predominated, we need not apply strict scrutiny analysis to the formation of District 3. They[sic] record and Judge Duval's well-supported findings reflect careful, thorough consideration of the issues in this sensitive case. The judgment of the district court is therefore AFFIRMED.

APPENDIX B

FILED
July 15 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DENNIS THERIOT, ANN RODRIGUEZ, RONALD PERRIN, NORMAN A. RONQUILLE, DAVID J. DOWELL, IRIS C. ISEMANN, HERMAN J. CARBO, JOANNE M. MIRE, IDA SAIK, and MAPLEWOOD CIVIC ASSO. INC.	) CIVIL ACTION) No. 95-2453) SECTION K) JUDGE) DUVAL
versus	)
THE PARISH OF JEFFERSON, STATE OF LOUISIANA, MICHAEL YENNI, in his official capacity as President of Jefferson Parish, ROBERT B. EVANS JR. in his official capacity as Chairman of the Jefferson Parish Council, T.J. "BUTCH" WARD, JAMES LAWSON, JR., DONALD JONES, EDMOND MUNIZ, ANNE MARIE VANDENWEGHE, and NICK GIAMBELLUCA, in their official capacities as members of the Parish Council, Parish of Jefferson, State of Louisiana.	)MAG. DIV.1)MAG. JUDGE

NOTICE OF APPEAL

Notice is hereby given that Dennis Theriot, Ann Rodriguez, Ronald Perrin, Norman A. Ronquille, David J. Dowell, Iris C. Isemann, Herman J. Carbo, and Maplewood

Civic Association, Inc., plaintiffs in the above-mentioned case, hereby appeal to the United States Court of Appeals for the Fifth Circuit from all but the below-mentioned portions of the final judgment entered herein on April 25, 1997, and with respect to which judgment a motion for new trial or alternative relief was denied by order entered June 20, 1997; plaintiffs-appellants do not appeal, however, from the dismissals from this case, by the said judgment, of Robert Namer, Thomas Codella, Cleta White, W. Fox McKeithen in his capacity as Secretary of State for the State of Louisiana, and Jerry Fowler in his official capacity as Commissioner of Elections for the State of Louisiana, nor do plaintiffs appellants appeal from the said judgment insofar as it relieves plaintiffs from payment of the costs incurred by defendants.

Respectfully submitted this15th day of July, 1997.

HAYWOOD H. HILLYER III, Bar No. 6925
Attorney-at-Law
P. 0. Box 15521
New Orleans, Louisiana 70175-5521
Telephone: (504) 899-0890
Facsimile: (504) 899-4851

DOMINIC N. VARRECCHIO, Bar No. 19456
Attorney-at-Law
1449 Magazine Street
New Orleans, Louisiana 70130
Telephone: (504) 524-8600
Attorneys for Plaintiffs

By: /S/ H. H. Hillyer III
H.H. Hillyer III

CERTIFICATE OF SERVICE

I CERTIFY that copies of the foregoing will have been served upon all opposing counsel promptly after the filing hereof, by hand delivery, facsimile transmission, and/or United States mail, on this 15th day of July, 1997.

/S/ H. H. Hillyer III

H.H. Hillyer III

APPENDIX C

Filed
April 24 1997
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DENNIS THERIOT, et al	CIVIL ACTION
VERSUS	NO. 95-2453
JEFFERSON PARISH, et al	SECTION "K"

JUDGMENT

This action came on for bench trial on March 10, 1997, before the court, the Honorable Stanwood R. Duval, Jr., presiding, and the issues and claims against the defendants having been duly tried, and after a review of memoranda, findings of fact and conclusions of law submitted by all parties, and for the reasons assigned in the order and reasons signed this date,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendants, the Parish of Jefferson, Aaron Broussard, in his official capacity as Chairman of the Jefferson Parish Council, John Lavarine, in his official capacity as a member of the Jefferson Parish Council, T. J. Ward, in his official capacity as a member of the Jefferson Parish Council, Donald Jones, in his official capacity as a member of the Jefferson Parish Council, Edmond Muniz, in his official capacity as a member of the Jefferson Parish Council, Nick Giambelluca, in his official capacity as a member of the Jefferson Parish Council, Lloyd F. Giardina, in his official capacity as a member of the Jefferson Parish Council, Timothy Coulon, in his official capacity as President of Jefferson Parish, the

United State of America, intervenor/defendant, Provino Mosca intervenor/defendant, the Council of the City of Kenner, Terry McCarthy, Betty Bonura, Marc Johnson, Jeannie Black, John Lavarnie, III Michael Branigan, Phil Capitano, in their official capacities as members of the Council of the City of Kenner, intervenors/defendants, and against the plaintiffs, Dennis Theriot, Ann Rodriguez, Ronald Perrin, Norman A. Ronquille, Daniel J. Dowell,Iris C. Isemann, Herman J. Carbo, and Maplewood Civic Association, Inc., dismissing their complaint with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as a result of previous motions to dismiss and rulings thereon, that Joanne M. Mire, Ida Saik, Robert Namer and Thomas Codella, are dismissed as plaintiffs in these proceedings with prejudice, for the reasons stated in the minute entries previously rendered herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that Cleta White is dismissed as a plaintiff herein with prejudice by virtue of the motion to dismiss previously filed by Cleta White and granted by the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that W. Fox McKeithen, in his official capacity as Secretary of State for the State of Louisiana, and Jerry Fowler, in his official capacity as Commissioner of Elections for the State of Louisiana, are dismissed as defendants with prejudice, by virtue of the ruling on the previous motion to dismiss filed in these proceedings for the reasons set forth in the minute entry dismissing these defendants.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that each party shall bear his, her or its respec-

tive costs.

New Orleans, Louisiana, this 24th day of April, 1997.

/S/ Stanwood R. Duval, Jr.
STANWOOD R. DUVAL, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D

Filed April 24 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DENNIS THERIOT, ET AL.	CIVIL ACTION
VERSUS	N0. 95-2453
THE PARISH OF JEFFERSON	SECTION "K"(1)

ORDER AND REASONS

Plaintiffs Dennis Theriot, Ann Rodriquez, Ronald Perrin, Norman A. Ronquille, David J. Dowell, Iris C. Isenmann, Herman J. Carbo and the Maplewood Civic Association, Inc. brought the instant suit against the Parish of Jefferson, et al.[1] (referred to *in globo* as "Defendants" or "Jefferson Parish"). Plaintiffs seek to have the Court declare the present configuration of the Third Councilmanic District of the Parish of Jefferson ("District 3") unconstitutional contending that it constitutes an illegal racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983. Plaintiffs rely primarily on *Shaw v. Reno*, 113 S. Ct. 2816 ("*Shaw I*") and *Miller v. Johnson*, 115 S. Ct. 2475

---

[1] Plaintiffs also named Michael J. Yenni, then President of Jefferson Parish, Robert Evans, Jr., T.J. "Butch" Ward, James Lawson, Jr., Donald Jones, Edward Muniz, Anne Marie Vanderweghe, and Nick Giambelluca. These persons were all members of the Parish Council for the Parish of Jefferson (also collectively referred to as "defendants. "

Prior to trial, pursuant to Fed. R. Civ. P. 25(d)(1), parties described herein were substituted as the result of the death of Michael J. Yenni and the results of the intervening elections.

(1995) for this proposition. Trial was held before the Court without a jury and the matter taken under submission. Having thoroughly reviewed the record, evidence, deposition testimony, memoranda and the relevant law, the Court has determined that defendants are entitled to judgment for the reasons that follow.

To the extent that any findings of fact are conclusions of law, they are adopted as such; to the extent that any conclusions of law are findings of fact, they are so adopted.

FINDINGS OF FACT

The Parties and Jurisdiction

The plaintiffs noted above are seven registered voters who reside in District 3. The remaining plaintiff, Maplewood Civic Association, Inc. is a Louisiana not-for-profit corporation domiciled in Jefferson Parish, whose members are some of the registered voters residing in the Maplewood Subdivision, and a majority of whose members reside and are registered voters in District 3.

Plaintiff-Intervenor, Provino Mosca, is a person of the full age of majority and a resident of Harahan, Louisiana.

The Parish of Jefferson is a political subdivision of the State of Louisiana. The defendants at the time of trial were Tim Coulon, in his official capacity as President of the Parish of Jefferson; Aaron Broussard, in his official capacity as Chairman of the Jefferson Parish Council; and T.J. "Butch" Ward, Lloyd F. Giardina, Donald R. Jones, Edmund J. Muniz, John Lavarine, and Nicholas Giambelluca, Sr. as

current members of the Jefferson Parish Council, who have been sued by plaintiffs in their official capacities. These defendants were and have been acting under the color of the statutes, ordinances, regulations, customs and usages of the State of Louisiana, Parish of Jefferson.

The Civil Rights Division of the Department of Justice intervened ("DOJ") and is aligned with defendants.

The Council of the City of Kenner ("Kenner")[2] also intervened in this matter to assert their interest in the continued three-way split of Kenner and Kenner residents' access to and influence over three council members elected from single member districts and one council member elected at large to the Jefferson Parish Council. Kenner is aligned with the defendants at this phase of the proceeding.

Although this matter was brought as a class action, no timely motion for certification was filed. Therefore, this action is not a class action.

The Court exercises its original jurisdiction over this action pursuant to 42 U.S. C. § 1983 28 U.S.C. §§ 2201 and 2202.

Background

This case is preceded by a long and tortured history. As a result, an overview of its history is necessary to place the facts of this case in context. These facts are basically uncontested and as such the Court finds them to be true.

[2] The Council of the City of Kenner is the duly authorized legislative body of the City of Kenner pursuant to its Charter. Terry McCarthy, Betty Bonura, Marc Johnson, Jeannie Black, John Lavarine, III, Michele Branigan and Phil Capitano are the elected members thereof.

The Parish of Jefferson is a political subdivision of the State of Louisiana and as such is subject to the strictures of the Voting Rights Act. The Jefferson Parish Council is a governmental body organized under the laws of the State of Louisiana. Pursuant to the Jefferson Parish Home Rule Charter, the Parish of Jefferson is governed by a Parish President and a council that is comprised of seven members. The Jefferson Parish Council is authorized to manage and operate parish government for the Parish of Jefferson, Louisiana.

Jefferson Parish is oddly-shaped and contains widely-diverse population. (See attached map of which the Court has taken judicial notice). The Parish stretches in a north-south direction with its largest population centers around the Mississippi River and Lake Pontchartrain. This area is reclaimed marsh land that was developed after World War II and much of the population growth began in the 1960's. South of this urban population surrounded by swamp are the areas of Lafitte and Barataria which are more rural in character. Further south crossing marsh, swamp, and water bodies, is Grand Isle which is 20 miles south of Barataria and is one of the foremost barrier islands for the State of Louisiana. This area is also rural in nature with fishing being its main source of income. Thus, the communities of interest vary within the Parish. Furthermore, those same geographic characteristics (uninhabitable marsh land) necessitate large, unpopulated land bridges to connect these diverse populated regions.

Beginning with its revised Home Rule Charter in 1957, Jefferson Parish changed from a police jury to a parish council form of government. The council members were elected through a combination of single-member, floterial,

and at-large districts. Each of the four districts elected one councilman. One member was elected form[sic] a floterial district comprised of Districts 1 and 2. Another floterial member was elected at-large from Districts 3 and 4. The seventh councilman, the Chairman, was elected from the Parish at-large. This arrangement was commonly known as the "4-2-1 Plan. "

In 1971, suit was brought, and the United States District Court for the Eastern District of Louisiana found that the districting plan for the Parish Council was malapportioned, and replaced it with a plan that satisfied the constitutionally required one-person, one-vote standard. *Grisbaum v. McKeithen*, 336 F. Supp. 267 (E.D.La. 1971). In the court-ordered plan, two of the four single-member districts crossed the Mississippi River in order to remedy the malapportionment of the existing districts. The districting plan ordered in *Grisbaum* resulted in Districts I and 2 being unusually shaped, with District 2 being very large in size, going from Grand Isle on the Gulf of Mexico to within a couple of miles of Lake Pontchartrain.

In January of 1986, a number of Jefferson Parish registered voters filed suit in a case entitled, *Cedric Floyd v. Parish of Jefferson*, C.A. 86-0265, alleging that the structure of the Jefferson Parish councilmanic districts violated the constitutional requirement of one-person, one vote. In 1987, as a consequence of that suit, the United States District Court for the Eastern District of Louisiana found that the districts were again in need of reapportionment. In a consent decree entered to settle the suit, the Parish Council amended its Home Rule Charter and reapportioned the councilmanic districts in accordance with that decree. That decree required that Jefferson Parish reapportion the four single member dis-

tricts to bring it into compliance with one-person, one-vote principles.

In the 1987 apportionment plan, Council District 1 included the easternmost portion of the Parish bounded by Orleans Parish to the east, Plaquemines Parish in the south, and Barataria Boulevard in the west (including Gretna, Harvey, and Marrero), and this area was connected by a narrow, largely uninhabited strip of land along the Mississippi River to an eighteen-sided corner of the East Bank (including the neighborhood of Southport and a portion of Metairie).

Council District 2 included the remainder of the West Bank bounded in the south by the Gulf of Mexico and Barataria Bay, in the west by St. Charles Parish, in the southwest by Lake Cataouatchi, and in the north by the Mississippi River, except where the district spanned the Mississippi River to include a nineteen-sided piece cut into the middle of the West Bank, extending as far to the north as I-10 bounded on the west by the Soniat Canal.

Council Districts 3 and 4 divided up the remainder of the East Bank. District 3 included Kenner and Harahan, the community of Riverbend, and the New Orleans Airport. District 4, the most compact of the districts, included the remainder of Metairie, as well as Bonnabel Place, Pontchartrain Shores and Pontchartrain Gardens.

The black portion of the population did not exceed 24 percent in any one of the districts under this plan.

This fact was not acceptable to a number of voters. The East Jefferson Coalition for Leadership and Develop-

ment ("the Coalition"), the Lincoln Manor Civic Association, and a number of registered voters in Jefferson filed suit against the Parish of Jefferson alleging that that plan for apportioning seats on the Jefferson Parish Council violated § 2[3] of the Voting Rights Act as the then existing system improperly diluted black voting strength. *East Jefferson Coalition for Leadership and Development, et al. v. Parish of Jefferson,* 691 F. Supp. 991 (E. D. La. 1988). As a result of that litigation, a number of findings, which have been judicially recognized as they apply to this case, were made.

The district court in that case found, *inter alia*, that (1) the minority group was sufficiently large and geographically compact to constitute a majority within a single-member district; (2) a historic pattern of racial discrimination existed and that vestiges of that discrimination remained; (3) blacks in Jefferson Parish were politically cohesive; (4) racial polarized voting existed in 1975 and 1979 councilmanic primary races; (5) when black candidates sought office in Jefferson Parish, a white bloc vote consistently defeated candidates favored by black voters and that candidates favored by blacks could win council seats in Jefferson Parish only when the preferred candidates were white. Thus, under the totality of circumstances employing the test found in *Thornburg v. Gingles*, 106 S. Ct. 2752 (1986), the district court found the electoral system in Jefferson Parish impeded the ability of minority voters to elect representatives of

[3] Section 2 of the Voting Rights Act forbids state voting procedures which abridge voting rights "on account of race or color" and states that redistricting plans which provide "less opportunity [to minorities] than other members of the electorate to participate in the political process and to elect representative of their choice" abridge voting rights. 42 U.S.C. § 1973 (Supp. 1994). *DeWitt v. Wilson*, 856 F. Supp. 1409, 1410 (E.D.Cal. 1994).

their choice. The court held that Jefferson Parish was in violation of § 2 of the Voting Rights Act and ordered alternative plans from plaintiffs and defendants in that case to be submitted.[4]

The First Foray to Form District 3

Initially, Jefferson Parish proposed a " 6-2-1 Plan," which would have increased the size of the council from seven to nine members--6 from single-member districts, two members from single-member " superdistricts, " and one member at large. This plan created no black majority district; District 3, under this proposal had a 45.9% black population. In a Proposed Order dated January 19, 1989, the district court tentatively approved Jefferson Parish's Plan with one modification--the elimination of the two superdistricts. *East Jefferson Coalition v. Parish of Jefferson* , 703 F. Supp. 28 (E.D.La. 1989).[5] The court in that ruling recognized that the legislative body charged with the basic charter-invoked responsibility must be given the first opportunity to devise an acceptable remedial plan. Id. at 29. However, it rejected the superdistricts because the creation of three at-large seats "would be essentially (and impermissibly) guaranteed to be 'white seats' due to the relatively low overall percentage of blacks [parish wide]." Id. at 30. The court rejected Jefferson Parish's justification that superdistricts were necessary to represent the East and West Banks.

---

[4]These facts were presented to the Court as uncontested in the parties' pre-trial order and are adopted by the Court as such.

[5]The Court has taken judicial notice of all of the preceding litigation and findings.

A fairness hearing was then held on March 2, 1989, the results of which were memorialized by the court in Order and Reasons found at 706 F. Supp. 470 (E.D.La. 1989). Apparently, Jefferson Parish accepted the *East Jefferson Coalition* court's elimination of the superdistricts and as such, the court approved the modified plan. In its order, the court noted that the plan likely would again be modified to reflect the 1990 Census before being implemented for the next set of parish elections to be held in 1991. Id.. at 472.

On March 7, 1989, the Jefferson Parish Council formally adopted this 6-1 plan. On July 7, 1989, the Court ordered Jefferson Parish to submit to the Attorney General the 6-1 redistricting plan and change in method of election for review pursuant to § 5 of the Voting Rights Act, 42 U.S.C. § 1973c (" Section 5 ").[6] On September 1, 1989, the Parish submitted the plan to the Attorney General. This 6-1 plan still did not contain a black majority district; one district had a black population of 46 %. This September 1, 1989 plan was adopted by a vote of a majority of the Parish Council.

The First Majority-Minority, 6-1 Plan

On November 17, 1989, the Attorney General interposed an objection to the September 1, 1989 districting plan, pursuant to Section 5. The Coalition then sought to impose their seven single-member district plan, and the United States participated as *amicus curie* at the hearing of the plaintiffs' motion for implementation of their plan. Shortly

---

[6] Section 5 of the Act prohibits a region subject to its provisions from implementing changes in any "standard, practice, or procedure with respect to voting" without authorization from the United States Attorney General. 42 U.S.C. § 1973c. *DeWitt v. Wilson*, 856 F. Supp. at 1410.

before the hearing, the parties to the *East Jefferson Coalition* case agreed upon a revised "6-1" districting plan that created one African-American majority district, District 3. It had a total black population of 51.7%, using the 1980 Census figures. The 1980 Census indicated that Jefferson Parish had a total population of 454,592 persons, of whom 380,645 (83.7%) were white and 63,001 (13.9%) were black.

On February 16, 1990, Jefferson Parish submitted a second six single member district plan to the Department of Justice for preclearance under Section 5, which included a district with a black-majority voting age population ("BVAP") of 51.7% . This plan was submitted to the Parish Council.

However, that plan was revised and superseded by a March 23, 1990 submission (the March 1990 plan)(Plaintiffs' Exhibit 33) to the DOJ for Jefferson Parish. It was adopted by a majority of the Council, including James Lawson. On May 10, 1990, the Attorney General precleared this plan. After the preclearance from the DOJ, the court approved the redistricting plan developed by the Jefferson Parish Council as the proper remedy to respond to the violations of the § 2 of the Voting Rights Act. On June 6, 1990, the district court entered a final order accepting the precleared plan.

The matter was appealed to the United States Court of Appeals for the Fifth Circuit. On March 21, 1991, the Fifth Circuit affirmed the district court's finding that the then-existing councilmanic structure was in violation of § 2 of the Voting Rights Act. *East Jefferson Coalition* , 926 F.2d 487 (5th Cir. 1991). The Fifth Circuit also remanded the case to the district court to "permit the district court to supervise

prompt implementation of the redistricting plan." Id. at 494.

After remand from the Fifth Circuit's March 21, 1991 ruling, the district court held a status conference stating that the plan had to be modified to accord with the population variances triggered by the 1990 Decennial Census. The court again encouraged the parties to work together to formulate the necessary modifications in an expedited fashion and to adhere to a May 15, 1991, deadline for submission of a modified redistricting plan.

Post-1990 Census--the Lawson Plan

In early 1991, the 1990 Census Data for Jefferson Parish had been released and showed that there was a substantial population deviation among the districts in this newly created districting plan. Jefferson Parish had a total population of 448,306 persons, of whom 74.0% were white and 17.5 % were African-American. District 3 as configured under the March 1990 adopted plan was shown to have a BVAP of 52.3 %.

Pursuant to the district court's directives, the Jefferson Parish Council modified the redistricting plan to accord with various changes necessitated by the latest census, and adopted the new plan by resolution on May 8, 1991. The modified redistricting plan retained the 6-1 councilmanic scheme, with six single-member councilmanic districts and one at-large seat. The plan also included an African-American majority councilmanic district, District 3, with a BVAP of 57.4 %, an increase of 5. 1 % in BVAP from the March 1990 configuration.

On May 15, 1991, the Parish of Jefferson filed its

modified plan with the district court in conjunction with a memorandum of law in support of the Council's proposal and a joint stipulation of the parties. The district court, however, appointed a special master. The plaintiffs in the *East Jefferson Coalition* case then requested that the district court order the parish to bide by the terms of the joint stipulation and submit the May 8, 1991 plan to the DOJ for preclearance. The trial court denied the plaintiffs' request for an injunction requiring submission of the plan for Section 5 review, and the plaintiffs filed an appeal with the Fifth Circuit. On June 10, 1991, the special master submitted a " 6-1 " redistricting plan to the district with a 49 % black voting age population, which was a reduction of the total black percentage in District 3 from the stipulated plan. On July 24, 1991, the trial court entered a Judgment implementing the redistricting plan drawn by the special master.

On appeal, on August 8, 1991, the Fifth Circuit approved the stipulated redistricting plan adopted by the Jefferson Parish Council on May 8, 1991, reversed the trial court's July 24th Judgment, and remanded the case to the district court. Specifically, the Fifth Circuit found the special master's plan to be a "Judge Made Plan" and that the district court had unlawfully intruded "into the bailiwick of the legislative branch of local governments. " In its ruling, the appellate court rejected the special master's plan for its failure, *inter alia,* to include one district with a majority black voting age population.

In its remand order the Fifth Circuit order specifically instructed the district court "to issue an injunction as soon as practicable, commanding [Jefferson Parish] to submit the May 8th Plan to the USAG for expedited review under § 5 of the VRA; and thereafter to ORDER implementation of

the May 8th plan immediately upon receipt of notice of preclearance of the May 8th Plan, assuming preclearance is timely forthcoming." *East Jefferson Coalition v. Parish of Jefferson,* C.A. No. 91-3511 and No. 91-3655, slip op. at 6 (5th Cir. August 8, 1991) (unpublished).

Accordingly, the district court issued a Judgment dated August 13, 1991, revoking its previous Judgment of July 24, 1991, and ordering that the Jefferson Parish Council immediately submit the May 8th plan for preclearance in accordance with Section 5. Jefferson Parish complied with that order and on August 27, 1991, the DOJ precleared the stipulated plan of May 8, 1991. It is that plan which is the subject of this suit.

The Final Plan Based on the 1990 Census Results.

The foregoing, uncontested facts indicate in only a minor way the contention, acrimony and difficulties encountered in arriving at a "compromise" plan based on the new 1990 census figures. The Court must now make its findings with respect to what was the primary force in the creation of District 3. Plaintiffs contend that race was predominant; however, the Court finds that while it was a factor, it is clear that political incumbency drove the pencil in designing these districts. Other factors that were at work were (1) the need to maintain a one-person/onevote ratio in the overall make-up of these districts, (2) the geographic realities of this parish, including considerations with respect to contiguity and compactness, and (3) other traditional districting principles. All were significant factors in the configuration of District 3 and far surpassed any racial concerns in the design of District 3. Indeed, the Court finds that the shape of District 3 was far greater a function of the "shape" of District

2 where James Lawson ("Lawson"), the "incumbent" from the 4-2-1 District 2, intended to run and win against his opponent Lloyd Giardina. Furthermore, District 3 has proven to unite valid communities of interest. The plan which is the subject of this lawsuit was the brainchild of James Lawson. Hence, the Court will referred to it as the "Lawson Plan. "

Incumbency

While the first majority-minority plan based on the 1980 census figures was adopted by Jefferson Parish, it had no real political consequences since the next scheduled elections were to occur after the 1990 Census results were to be implemented. The politicians knew that the changes in population would result in a modification of the 6-1 Plan. Furthermore, the next elections would necessarily pit incumbents against one another with the removal of the "floterial" seats. Indeed, Lawson testified that he was not as concerned with the configurations of those districts in the initial March 1990 scheme for that precise reason.

Thus, when the 1990 census figures were produced, Lawson knew that his political future hinged on obtaining the "best possible" District 2 from an electorial standpoint. Lawson had represented District 2 under the 4-2-1 Plan. District 3 was to remain the majority-minority district, so Lawson set out to insure that his strongest political constituencies would be placed in District 2 and that his anticipated opponent Lloyd Giardina's strongholds would be placed in District 3.

As a result he purposefully intended to have Westwego, the Lafitte area, Harvey, Marrero and Avondale

in his bailiwick. With these goals in mind, certain areas of what had been a more "compact" district, were cut and spliced onto District 3. If an area was considered good political fodder for Lawson or if it was considered harmful to Giardina, that area was placed in District 2.

Thus, precincts were carved up and politically gerrymandered. Grand Isle and lower Lafitte had been in District 2. These areas were "pro-Giardina"; thus, Lawson recognized that it would be more favorable to move these areas out of District 2 into District 3. This area is in the southern portion of the Parish and is divided from the incorporated municipality of Jean Lafitte by canals and the Intracoastal Waterway. Thus, Lawson carved a "v" into that tail, the entirety of which previously had been in District 2 and protected as much of the Lafitte area[7] which he considered politically positive territory. This area remained in District 2. He jettisoned the rest into District 3; thus, Grand Isle and Barataria became part of District 3.

Race could not have motivated this division. Under the precinct-by-precinct population data for the challenged plan in Plaintiffs' Exhibit 5, the total 1990 Census black population of Precinct 247, the unincorporated area across the waterway form the town of Jean Lafitte, which Defendants' Exhibit 19 shows was allocated to District 3 rather than District 2, contains 170 persons, of whom only 14.7 % are black. Accordingly, the assignment of undivided precinct 247 to District 3 did not increase the level of black voting strength in resulting District 3.

With respect to Avondale, it would have been easier

[7] 1 L and 2L--precincts of the Village of Jean Lafitte, 248 and 246B all went into District 2 for this reason.

to have left this area in District 3 as the area was more African-American in population; however, Lawson insisted on moving part into District 2. As a result Precincts 157A and 157B were created. Precinct 157A was populated and went into District 2; Precinct 157B is basically unpopulated, and it went into District 3 to provide a land bridge to Grand Isle. (Testimony of Gandolfi).

Marrero, a perceived Lawson stronghold, was carved up, in particular Precinct 174A & 174B. Precinct 174B is by far the larger portion and it went into District 2. Precinct 174A became part of District 3.

Woodmere likewise was divided. Lawson for political reasons also sought to eschew that part of the Woodmere Subdivision whose residents he had angered by diverting funds earmarked for drainage relief in the form of a pumping station, but which funds were insufficient for that purpose, to another project. (Testimony of Lawson, Kenneth Hughes, Alan Gandolfi, and Ward). Furthermore, the division of Woodmere, with Precinct 195 in District 2 and Precinct 196 in District 3, cannot be explained by claiming race was the motivation. Neither precinct is majority black -Precinct 195 is 22.4% black and Precinct 196 is 27.7% black.

Other Plans Considered

At least two other plans were considered, both of which may have been more "compact" or "prettier. " The East Jefferson Coalition proposed their plan which had a majority-minority district with a BVAP of 55%. This plan ran in a more east-west direction which parallels the direction of the African-American population of Jefferson Parish.

Nonetheless, this plan totally eschewed all principles of incumbency and traditional geographic districts in Jefferson Parish making its viability dubious at best. Obviously, this plan had no support by the Parish Council and thus, as plans are to generally be the product of the legislature, its future was bleak. However, one outgrowth of this plan was the belief on the part of Lawson that his plan had to meet or beat" the BVAP of the majority-minority district of the.East Jefferson Coalition Plan. However, the testimony is unequivocal that this perception was only in Lawson's mind. DOJ never required this heightened BVAP. Thus, to the extent that the "meet or beat" goal existed, it was political in nature--Lawson wanted insurance that **his** plan would be adopted as it protected his position. This was not an instance of race as proxy.

The other plan was one propounded by Lloyd Giardina, the floterial incumbent, who had chosen to run in District 2 because Butch Ward was his ally and Ward was the incumbent in District 1. This plan likewise was "prettier" and the traditional non-"V'd" District 2 remained in tact[sic]. Woodmere remained in District 2 and Avondale was in District 3. He had wanted to include Terrytown and Maplewood in his version of District 2; however, one-person/one-vote concerns prevented him from doing so. His plan was politically dead in the water. Lawson had outmaneuvered Giardina. Giardina could not even get a second for his plan. Lawson had previously obtained the votes of the other council members based on their belief that the Lawson plan preserved a politically ideal situation--their re-election. Furthermore, as to Lawson's opinion of the Giardina Plan, he admitted that it was unacceptable because it took away Lawson's voting strength and added voters to District 2 that were not familiar with him.

One-Person/One-Vote Considerations

The testimony was overwhelming that one-person/one-vote considerations were paramount in configuring these districts. (Testimony of Gandolfi, Lawson, Duker, Gelfand and Creed). Considering that Jefferson Parish had been taken to task in prior suits for its failure to abide by this principle, the council members were intimately aware of the need to spread population evenly. Alan Gandolfi, who is an attorney and was a research analyst for Jefferson Parish at the relevant time, testified that indeed this factor was his primary concern in doing his job with respect to the creation of a districting plan. For Gandolfi, with respect to tailoring the plan, one-person/one-vote considerations were followed by the need to remedy the § 2 violation and finally political wishes. With the 1990 Census results, District 3 had lost and District 1 and 2 had gained population. As District 2 was contiguous to District 3, geographically and for the sake of compactness, population needed to be moved into District 3.

Furthermore, the division of the Maplewood Subdivision was the result in part of these concerns. Maplewood had been initially placed wholly in District 3; however, Ida Saik had raised political Cain because she did not want to be taken out of Butch Ward's district, District 1. While community of interest concerns would militate against dividing a subdivision, it was imperative that for purposes of one-person/one-vote, the entirety of the subdivision not be put in District 1; hence, the split with Precincts 213A &C staying in District 3 and Precinct 213B being placed in District 1.

Also, the "zig-zagging" around the Harvey Canal was also necessitated by the oneperson/one vote dictate. It

was because of this concern that District 3 crossed over the Harvey Canal. (Testimony of Duker).

Geographic Considerations, Including Compactness and Contiguity

Historically, Jefferson Parish districts ran in a north-south direction. Considering that the parish is tongue-shaped, this fact is not surprising. However, the African-American population runs more in an east-west direction. Thus, in trying to form a majority-minority district these two realities had to be reconciled. Those persons involved in the actual drafting of the plan, Gandolfi, Hughes and Duker, all testified that compactness and contiguity were thus concerns.

Because of the need for contiguity particularly in light of the need to include certain more north-eastem population centers in District 3, precincts were divided to provide land bridges. One, which was previously discussed, was Avondale with respect to Precincts 157A and 157B. As noted, however, 157B is uninhabited, so splitting it off did not effect[sic] a community of interest. Harvey and Marrero were similarly split for bridging purposes and the Lafitte area as well.

Another factor that makes a more "perfect" configuration difficult is that there are vast tracts of uninhabited areas which make the districts more irregular in shape. (Testimony of Creed). Furthermore, dividing the district into 6 rather than 4 creates more margin for irregularity. Thus, taking into account all of these factors, the instant plan is sufficiently compact.

Other Traditional Districting Considerations

Jefferson Parish was not unaccustomed to splitting districts in order to achieve political goals. Indeed, as previously noted, most "splits" are supportable with viable reasons. Furthermore, as the precincts which were being split were somewhat new resulting from the mandate of the state legislature, the communities of interest were not as rigid within the precinct. (Testimony of Duker, Plaintiff's Exh. 15, Exh. G, D0117). Thus, it was not unusual, or contrary to Jefferson Parish's traditional districting considerations to split precincts even though this might not be the general norm.

David Creed also testified and the Court finds that no actual "stacking" occurred. "Stacking" is where more than 90% of one race is included or less than 10% of one race is left out of a district. Stacking is generally considered acceptable in the districting context. Had Jefferson Parish intended to stack, it could have included Shrewsbury and McDonoughville which it did not. Thus, the evidence does not prove that race predominated.

Communities of Interest

Plaintiffs maintain that there is little evidence that communities of interest were actually considered as such in the shaping of the subject district. However, this position ignores the fact that the Jefferson Parish Council which drafted the subject plan were defendants in the East Jefferson Coalition case during which evidence concerning the socio-economic conditions of the Parish's neighborhoods and subdivisions was produced. Obviously then, the Parish council was not oblivious to these facts.

Furthermore, it is evident to this Court that District 3 for the most part does share communities of interest. To begin, the historical background provided by Wilma Irving Laurence Powell, and Eugene Fitchue prove that the African-American communities located both on the East Bank and the West Bank of Jefferson Parish has been united in their efforts to improve schools, fire protection, sewerage, drainage and to obtain paved streets and sidewalks for their neighborhoods. The creation of the majority minority District 3 has created a legitimate opportunity to respond to neighborhood concerns and be more successful in achieving these goals.

Arleta Terrel's testimony further confirmed that a community of interest exists because of the economic similarity of the African-American community in District 3. The black residents of Jefferson Parish are a socioeconomically distinct community in that, as a group, they are dramatically lower in income, less educated, and more poorly housed than their white counterparts. District 3 does bring together a community of interest among black residents of the Parish that manifestly belonged in a single district, and had long been fragmented among council districts to the detriment of present District 3's residents.

One could argue that the splitting of the Maplewood subdivision would indicate that communities of interest were ignored. However, the reality is that (1) Ida Saik caused the division and (2) the Court heard precious little testimony of any real harm arising out of this division.

Another community of interest that plaintiffs claim was the townspeople of Lafitte assigned to District 2 and the others in the unincorporated area beneath it in District 3. The

Court heard ample credible testimony that the communities of interest were not trampled because these two areas did not actually contain one cohesive group as evidenced by the fact that the lower area chose not to become part of Village of Jean Lafitte.

Finally, the Court finds that by virtue of the geographic realities of the Parish and the history of its development, the Parish itself is made of extremely different communities of interest. This Parish has as residents some of the most wealthy individuals in this state as well as some of the most poor. It contains both urban and rural societies. It houses bustling industrial and retail centers as well as fishing communities. Considering these realities, District 3 as constituted has united, as closely as possible, interests that are related.

Wildgen Testimony and the Use of the Geodistricting Software

The Court finds that the use of the Geodistricting Software did not predominate in the formulation of District 3. While it is beyond cavil that race was a consideration, it did not drive the Lawson Plan. John Wildgen testified otherwise; however, the Court found his testimony to be unavailing.

Wildgen designated 5 areas that he claims were "black" areas used solely to increase the "blackness" of District 3. With respect to the Kenner precincts 13K-b, 21K and 22K, the Court does not find this projection so irregular. Furthermore, the community of interest at work supports its inclusion in District 3. Furthermore, with respect to Precinct 13K-b, Wilma Irvin testified that this division is consistent

with the split Kenner district lines. With respect to the Avondale Precincts 156 and 157B, 157B was divided for a land bridge and contains no people. Concerning the Marerro Precincts 173, 180 and 181, the Court believes the evidence demonstrated that these were moved because of one-person/one-vote concerns. Likewise, certainly the Maplewood division was explained adequately for one-person/one vote concerns, along with the Ida Saik' uproar. Finally, with respect to Precincts 104 and 33K , these areas certainly share the community of interests such that they should be included in District 3.

Likewise, the Court found less than persuasive the testimony of Robert DeViney who was involved in the redistricting process. He testified that the configuration of District 3 was a racial gerrymander. He testified that he disagreed with the entire process arising out of the Voting Rights Act alegations making in this context his opinion suspect. Other like opinions (i.e. District 3 was a racial gerrymander), were demonstrated to be without foundation in fact through the evidence adduced at trial.

Retrogression

Because of the increase in black population in District 3 under the findings of the 1990 Census, Jefferson Parish was justified in using 52.3% BVAP as the benchmark for to determine retrogression under Section 5. The Court recognizes that Lawson overshot this number by almost 5% points. However, as explained in detail above, the motivation here truly was political not racial. Plaintiffs did not prove in their case that there was the kind of coercion and intent to "maximize" black population within District 3 by DOJ that was critized in *Miller v. Johnson,* 115 S. Ct. 2475

(1995). Here, it was not DOJ, but Lawson's albeit misguided appreciation of the situation which resulted in this jump.

Vestiges of Discrimination

The record of the *East Jefferson Coalition* case, many of the uncontested facts contained in the Pre-Trial Order and the testimony received at trial lead to the ineluctable conclusion that there remains vestiges of discrimination in Jefferson Parish. The court finds based on the testimony of Irvin, Cassimere and Powell that there are vestiges of discrimination. In particular the evidence with respect to the resolution to isolate the predominantly white portion of Maplewood from the predominantly black by use of a barricade is compelling. Another incident has to do with the stop orders issued by Sherrif Lee concerning stopping black individuals in predominantly white neighborhoods. While discrimination is certainly not on the scale of what it was in the 1950's, race neutrality has not been achieved in Jefferson Parish at this time.

Plaintiffs' Contentions

As noted, plaintiffs contend that District 3 is the product of an racial gerrymander and seek the redistricting of the Jefferson Parish Council on "a basis not predominantly motivated by racial considerations" relying on *Shaw v. Reno,* 113 S. Ct. 2816 ("*Shaw I*") and *Miller v. Johnson*, 115 S. Ct. 2475 (1995). Plaintiffs argue that race was the predominant factor in the configuration of District 3 and as such must be subject to "strict scrutiny." They further maintain that strict scrutiny will demonstrate that the district was not "narrowly tailored" and thus is unconstitutional in its present configuration. As a basis for this position, plaintiffs rely on

the odd shape of the district and the context in which District 3 had its genesis. Plaintiffs bear the burden of proof in these respects, and this Court finds that plaintiffs failed in this endeavor.

CONCLUSIONS OF LAW

The Applicable Law

In *Miller*, the Supreme Court grappled with the constitutionality of Georgia's Eleventh Congressional District which had been configured in response to the Justice Department's refusal to preclear earlier reapportionment plans pursuant to § 5 of the 1965 Voting Rights Act. As the Fifth Circuit noted in *Clark v. Calhoun County, Mississippi*, 88 F.3d 1393 (5th Cir. 1996), discussing plaintiff's burden of proof as set forth in *Miller:*

> The Court encountered greater difficulty, however, in affirmatively defining the plaintiff's burden of proof. The Court acknowledged that legislatures will "almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process. [*Miller*, 115 S. Ct. at 2488]. Distinguishing between permissible awareness and impermissible motivation "may be difficult" and will require courts "to exercise extraordinary caution in adjudicating claims that a state has drawn district lines on the basis of race. " *Id.* Nevertheless, the Court attempted a definition:
>
> > The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to

> legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations.

Id. Justice O'Connor added in her concurring opinion that this standard was "a demanding one, " requiring the plaintiff to show that the legislature "has relied on race in substantial disregard of customary and traditional districting practices. " *Id.* at _, 115 S. Ct. at 2497 (O'Connor, J., concurring). In those cases where the plaintiff successfully proves that race was the "predominant, overriding" consideration motivating the drawing of district lines, the burden shifts to the defendant to demonstrate that its districting plan is narrowly tailored to achieve a compelling governmental interest. *Id.* at _ , 115 S. Ct. at 2490.

Id. at 1402-03. If a district is "narrowly tailored" it survives "strict scrutiny" and is not unconstitutional.

The Supreme Court explained in *Bush v. Vera*, 116 S. Ct. 1941 (1995):

> Strict scrutiny would not be appropriate if race-neutral, traditional districting considerations predominated over racial ones. We have not subject political gerrymandering to strict scrutiny. . . . And we have recognized

> incumbency protection, at least in the limited form of "avoiding contests between incumbent[s], " as a legitimate state goal....

Id. at 1954 (citations omitted).

Thus, this Court must find that Jefferson Parish ignored, inter alia, compactness, contiguity, respect for political subdivisions or communities defined by actual shared interest, as well as the overriding necessity of creating districts true to the principles of one-person/one-vote, to racial considerations in order to decide whether an Equal Protection Claim has been raised. Then, if race predominates, the Court must assess whether Jefferson Parish can satisfy strict scrutiny.

If it so finds, Jefferson Parish would then be required to demonstrate that its districting legislation is (1) narrowly tailored (2) to achieve a compelling state interest. *Miller*, 114 S. Ct. at 2490.

Does District 3 Require Strict Scrutiny?

The Court finds that plaintiffs failed to carry their burden of proof with respect to proving that racial considerations predominated in the configuration of District 3 that is the subject of this litigation. While race, through the force of § 2 of the Voting Rights Act, provided the genesis for the majority minority district, it did not dictate the eventual boundaries of District 3. An analysis of the evidence adduced supports this finding.

Shape of the District

While plaintiffs have consistently opined that the

shape of this district is so bizarre on its face as to be inexplicable on grounds other than race, this Court disagrees completely. Even at first glance, this Court does not believe that the shape is so horrific so as to demonstrate circumstantially that race motivated the form of the district. District 3 is neither a "Rorschach ink-blot test" nor a "bug splattered on a windshield. " It does not wind in a serpentine fashion; it does not resemble "a sacred Mayan bird. " This district does not have those visual indices that are so allegedly obvious in *Hayes, Miller* and *Shaw*. There are not the kind of narrow land bridges that conflict with the Eleventh Amendment and were condemned in *Miller.* Most, if not all of those "bridges" are uninhabited, geographical necessities in District 3.

The Court recognizes that in the past, District 2 was comprised of the entire "peninsula" that is Jefferson Parish's wetlands tail. All of Lafitte and Barataria were included. Thus, to the extent that the length of the district creates "irregularity", that is necessitated by the Parish's shape. Nonetheless, the Lafitte split was proved to be anchored in political necessity and the Lawson/Giardina fight for a district. Furthermore, the geographic concerns outlined earlier also explain the peculiar shape. Grand Isle is 20 miles away from the nearest land mass in the northsouth axis of this district. In relation to the breadth of the east-west axis, there are also immense unpopulated areas included that make this area vast. Moreover, these areas have a substantially predominate white population.

This Court stands convinced that the changes that occurred to create District 2 and District 3 as they are now configured were driven primarily by politics. The second force was the concern centered around one-person/one-vote. Race was a concern, but it did not predominate. For exam-

ple, Lawson's decision to reach in and take Avondale into District 2 for political reasons, required substituting other populations for that which was stripped out of pre-1990 Census District 3. Politics also drove part of Woodmere into District 3. The Court will not reiterate its previous findings of fact. However, the Court firmly believes that those findings support the conclusion that strict scrutiny has no place in this inquiry.

This is not an instance where the councilmen used race as proxy. They were intimately aware of the various voting habits of their various constituents. They did make partisan political decisions in which race was used as a means to identify potential constituent support. All council members did testify as to their familiarity with the constituent neighborhoods in and surrounding District 3 and where applicable the degree to which these areas had supported their respective candidacies in the past. This fact is most evident in the testimony of both Lawson and Giardina.

Nonretroactive Application of Shaw I and Its Progeny

As previously noted, the plan at issue herein was specifically approved by the Fifth Circuit, and the Parish was thereby ordered to submit that plan to the United States Attorney General for expedited review under Section 5. *East Jefferson Coalition v. Parish of Jefferson*, C.A. No. 91-3511 and No. 91-3655, slip op., (5th Cir. August 8, 1991) (unpublished). The parties have not cited to the court any reapportionment case where any court, applying *Shaw I* and its progeny, has overturned a districting scheme adopted pursuant to a United States Appellate Court decision. Therefore, there is a question as to whether *Shaw I* and progeny should have a retroactive effect on the instant plan.

In *Jackson v. DeSoto Parish School Board*, 585 F.2d 526 (5th Cir., 1978), the late Alvin B. Rubin writing for the court, stated:

> American citizens have a constitutional right to participate fully and effectively in the election of county governmental authorities, . . . reapportionment plans, whether adopted by legislative enactment or court order, are not immutable. The judicial process must be flexible enough to allow changes to schemes that have, because of changing population patterns and the developing body of constitutional jurisprudence, become unconstitutional in their operation.
>
> [While decennial a reapportionment as a rational method], ... this does not mean that a political body cannot be compelled to reapportion itself more than once every ten years.
>
> A challenge to the constitutionality of a court - or a reapportionment plan - is not precluded by principles of res judicata or federal estoppel. It has long been established that res judicata is no defense where, between the first and second suits, there has been an intervening change in the law or modification of significant facts creating new legal conditions . . .
>
> Such inequity becomes particularly intolerable when, as here, constitutional rights are involved. This court has thus been unwilling to bar subsequent challenges to reapportionment schemes, seemingly constitutional when institute by the

> court, but apparently adequate under the rapidly changing jurisprudence in this area . . . .

Id. at 728-29.

Defendants acknowledge that their challenge to the constitutionality of a court ordered reapportionment plan is not precluded by principles of res judicata or collateral estoppel. However, the defendants do contend that this Court should exercise its discretion to decline remedial action in the application of recent constitutional jurisprudence because of the manifest injustice to the Jefferson Parish defendants. Defendants contend that this discretion is granted by the holding of *Chevron Oil Company v. Huson,* 404 U.S. 97, 92 S. Ct.349, 30 L.Ed.2d 296 (1971). The Supreme Court outlined the relevant three factors to considered with regard to the nonretroactive application as follows:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed, ... Second, it has been stressed that 'we must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation ". . . . Finally we have weighed the inequity imposed by retroactive application, for " [where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the

'injustice or hardship by a holding of nonretroactivity."

Chevron, 92 S. Ct. at 355 (citations omitted).

In the event of retroactive application of the costruction of the Equal Protection Clause and the Voting Rights Act in *Shaw I* and its progeny were applied here, defendants urged that it would produce substantial and inequitable results. Jefferson Parish would allegedly be exposed to the penalty and burden of redistricting, in addition to the possible taxing of attorney's fees and costs of the plaintiffs against it as a "remedy" for its previous compliance with a remedy ordered by this very court in the *East Jefferson Coalition* case.

Since this Court has held that strict scrutiny does not apply in this case, and therefore, there has been no constitutional violation, no harm has resulted in re-evaluating the situation in light of *Shaw I* and its progeny. Thus, there being no "injustice" as defined by defendants resulting, there is no reason under the circumstances of this case not to apply the new case law. The Court recognizes that to a degree, this decision may be putting the cart before the horse and that in other circumstances a court may be faced with such a request early on in the litigation to forestall the application of a new principle of law. However, in the case at bar, this request was raised at the eleventh hour. As such, the equities dictated that the Court not exercise its discretion in this manner.

CONCLUSION

In sum the shape of District 3 is certainly not a paradigm of compactness. However, it is not bizarre in com-

parison to districts which have been stricken by other courts. More importantly, most of its "aberrant" aspects were caused not by race but by the following: (1) political incumbency concerns, particularly those of James Lawson, (2) the unique configuration of the Parish; (3) the unique topography of the Parish as it is at least 50% marsh and water, (4) one-person/one-vote considerations, (5) vocal political activism such as that demonstrated by Mrs. Ida Saik, and (6) Grand Isle's being 20 miles away from any other inhabited area of the Parish. Thus, all of these factors, as well as those others mentioned above like community of interests, were considered by the Jefferson Parish Council while it was also conscious of race. As such, the Court is convinced that "in the context of redistricting, where race is considered only in applying traditional redistricting principles along with the requirements of the Voting Rights Act, that strict scrutiny is not required. " *DeWitt* , 856 F. Supp. at 1415. Furthermore, even if it were required, this plan has been narrowly tailored to meet a compelling state interest.

Accordingly,

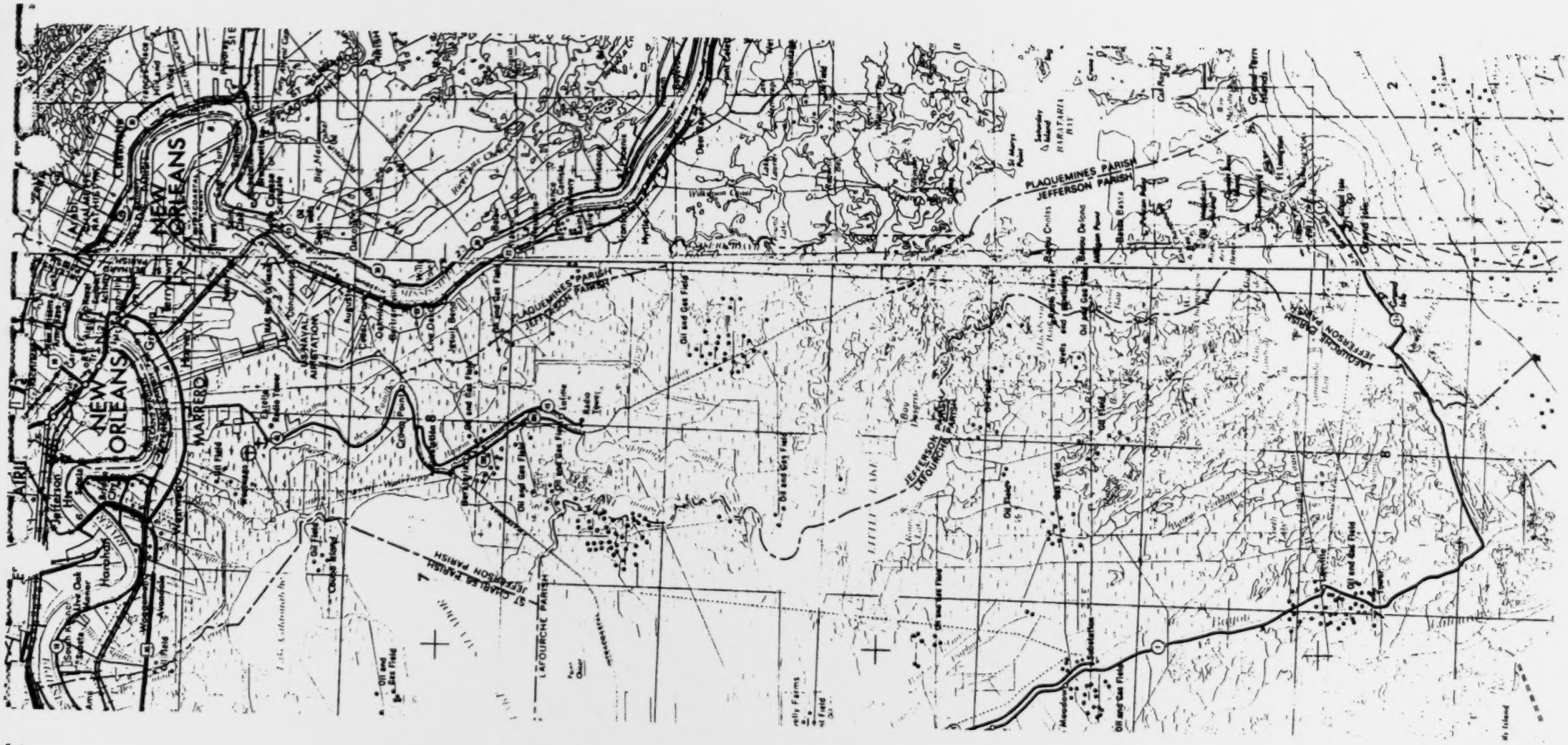
IT IS ORDERED that judgment be entered in favor of the Parish of Jefferson, Tim Coulon, in his official capacity as President of the Parish of Jefferson; Aaron Broussard, in his official capacity as Chairman of the Jefferson Parish Council; and T.J. "Butch" Ward, Lloyd F. Giardina, Donald R. Jones, Edmund J. Muniz, John Lavarine, and Nicholas Giambelluca, Sr. as current members of the Jefferson Parish Council, who have been sued by plaintiffs in their official capacities; intervenor, the Civil Rights Division of the Department of Justice; Council of the City of Kenner ("Kenner") and against plaintiffs Dennis Theriot, Ann Rodriquez, Ronald Perrin, Norman A. Ronquille, David J.

Dowell, Iris C. Isenmann, Herman J. Carbo and the Maplewood Civic Association, Inc., dismissing plaintiffs' complaint, with each party to bear his, her or its respective costs.

New Orleans, Louisiana, this 24th day of April, 1997.

/S/ Stanwood R. Duval, Jr.

STANWOOD R. DUVAL, JR.
UNITED STATES DISTRICT COURT
JUDGE



03423

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
991203 NOV 15 1999
OFFICE OF THE CLERK
No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Dennis Theriot; Ann Rodriguez; Ronald Perrin; Norman A. Ronquille; David J. Dowell; Iris C. Isenmann; Herman J. Carbo; Maplewood Civic Association, Inc.
Petitioners,

v.

Parish of Jefferson, State of Louisiana; T. J. Ward, also known as Butch; Donald Jones; et al.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX II

Haywood H. Hillyer III, La. Bar No. 6925
Attorney-at-Law
P.O. Box 15521
New Orleans, Louisiana 70175-5521
Telephone: (504) 899-0890
Facsimile: (504) 899-4851
Counsel of Record

Of Counsel:
Dominic N. Varrecchio, La. Bar No. 19456
1449 Magazine Street
New Orleans, Louisiana 70130
Telephone: (504) 524-8600

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed OCT 9 96

DENNIS THERIOT, ET AL CIVIL ACTION

VERSUS 95-2453

THE PARISH OF JEFFERSON, ET AL SEC. "K"(l)

Defendant-Parish of Jefferson seeks a protective order quashing the depositions of its counsel of record, Harry Rosenberg and M. Nan Alessandra, and the subpoenas duces tecum served upon them. Defendant argues that plaintiff-intervenor Cleta White seeks priviledged information obtained by attorneys Rosenberg and Alessandra during said attorneys' representation of defendant in a prior similar action entitled "East Jefferson Coalition v. Parish of Jefferson", CA#86-3668"M".

Plaintiff-intervenor counters that defendant's attorneys have "unique and exclusive" ability to state "how and why the particular remedy to the original *East Jefferson Coalition v. Parish of Jefferson* lawsuit came about ... and the fairness and legality of the particular remedy." (Quoting p. 4, White's Memorandum in Opposition to Defendant's Motion to Quash...)

Federal Rule of Civil Procedure 26(b)(1) allows for discovery "regarding any matter, not priviledged, which is relevant to the subject matter involved in the pending action..." The party seeking to block its attorney's deposition concerning relevant information will succeed if it establishes undue burden or opposition measured by (1) the quality

of information in the attorney's knowledge, that is, whether the deposition would be disproportional to the discovering party's needs; (2) the availability of the information from other sources that are less intrusive into the adversarial process; and (3) the harm of the party's representational rights of its attorney if called upon to give deposition testimony. *Johnston Dev. Group v. Carpenters' Local 1578*, 130 F.R.D. 348, 353 (D.N.J. 1990); *N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.*, 117 F.R.D. 83 (M.D.N.C. 1987).

Taking the deposition of opposing counsel is a practice that has long been discouraged as disruptive of the adversarial system and one which should be employed only in limited circumstances. *Shelton v. American Motors Corp.*, 805 F. 2d 1323, 1327 (8th Cir. 1986); *See also in re Taxable Municipal Bonds Litigation*, Civ. A. No. MDL 863, 1993 WL 45156, at *2 (E.D. La. Feb. 12, 1993). Nevertheless, the Supreme Court has made clear that when appropriate, an attorney may be forced to disclose those facts in his possession that are relevant to a lawsuit. In re: *Taxable Municipal Bonds Litigation, supra.* (citing *Hickman v. Taylor*, 329 U.S. 495, 511, 67 S. Ct. 385, 393-94, 91 L.Ed. 451 (1947)). The deposition of an attorney may be "both necessary and appropriate" where the attorney may be a fact witness,, such as an "actor or viewer," rather than one who "was not a party to any of the underlying transactions giving rise to the action," or whose role in a transaction was "speculative and not central to the dispute. *Johnston*, 130 F.R.D. at 352 (citations omitted).

The plaintiff -intervenor has already received certain nonpriviledged documents from the Department of Justice relative to the redistricting of the Jefferson Parish councilmanic districts and Jefferson Parish's application to the

Department of Justice for pre-clearance. Moreover, during the last possible week of discovery, plaintiff-intervenor has noticed the depositions of eleven (11) potential witnesses, current and former council members and Jefferson Parish employees who were involved in the formation or reformation of the council districts. Yet, five weeks prior to trial, in the midst of the defendants' trial preparation, plaintiff-intervenor has subpoenaed for deposition the defendants trial attorney and counsel of record.

Clearly, the council members, certain Jefferson Parish employees, and Department of Justice personnel should have information concerning the councilmanic structure of Jefferson Parish and should be able to testify as to any non-priviledged information sought by the plaintiff-intervenor, such that the depositions of attorneys Rosenberg and Alessandra are not necessary.

The Fifth Circuit has stated that "[t]he attorney-client privilege 'was intended as a shield, not a sword. When confidential communications are made a material issue in a judicial proceeding, fairness demands treating the defense as a waiver of the privilege.' " *Conkling v. Turner*, 883 F. 2d 431, 435 (5th Cir. 1989). Accordingly, "the attorney-client privilege is waived when a litigant 'places information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would be manifestly unfair to the opposing party.'" Id. In *Conkling* the Fifth Circuit held that where defendants raised a defense based on statute of limitations and plaintiff responded with a tolling argument based on his lack of knowledge, plaintiff had placed his knowledge at issue and defendants were entitled to depose plaintiff's attorney about the timing and extent of plaintiff' s attorney

about the timing and extent of plaintiff's knowledge about his claim. Id. at 434-35.

Plaintiff-intervenor contends her "... inquiry sought here ... in no way seeks to have these (attorney) witnesses waive the attorney-client privilege, thus distinguishing this matter from that of *Conkling v. Turner*, ..." In view of that concession and the record as a whole, litigants here have not made confidential communications a material issue in these proceedings. Therefore, there has not been a waiver of privilege objections by defendant.

Plaintiff-intervenor has begun the process of taking depositions of certain Jefferson Parish officials and employees who should have the same information that is being sought from the Parish's attorneys. Further, if, as suggested by plaintiff-intervenor, the U.S. Department of Justice's involvement "in fashioning a remedy to the earlier litigation will likely play a key role in determining the legality of the current Parish of Jefferson Parish Council districts", plaintiff -intervenor should have sought discovery from the Department of Justice officials with direct knowledge about the Department's involvement in the "East Jefferson Coalition" case.

Plaintiff -intervenor's premise that defendant's attorneys are the only persons with information about how or why re-districting or a remedy occurred is rank speculation hovering near the absurd.

Paraphrasing Judge Schwartz in *Collins v. Coastline Construction, Inc.*, CA #92-16"A", 1992 U.S. Dist. LEXIS 7076 (E.D. La. May 14, 1992), plaintiff -intervenor has put the cart before the horse by noticing these attorneys' depo-

sitions. Even by her own admission, plaintiff-intervenor has already obtained Attorney Alessandra's testimony about the prior litigation via transcript made of her examination before the Court on June 24, 1991. The latter examination occurred in connection with a Rule 11 proceeding in the "East Jefferson Coalition" case. In explaining her client's attempted compliance with court orders, Attorney Alessandra described how the council confected a plan and named the Department of Justice official involved in achieving compliance with a U.S. Fifth Circuit mandate to receive a redistricting plan. *See East Jefferson Coalition for Leadership and Development, et al v. Parish of Jefferson, et al,* 926 F.2d 487 (5th Cir. 1991).

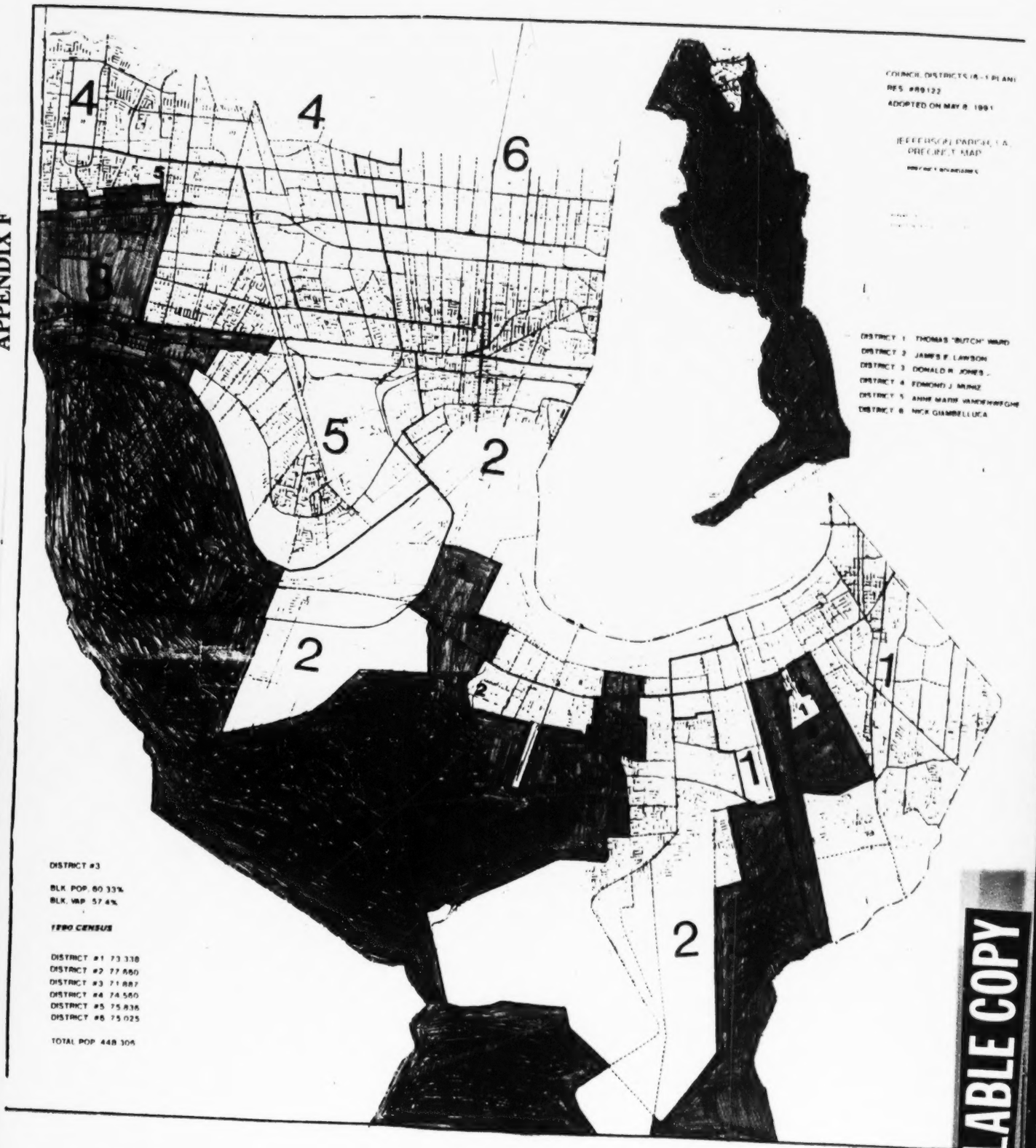
Defendant has clearly shown that there are other persons who should be deposed instead of prevailing upon their attorneys for information that would invade the attorney-client privilege and the attorneys' work product. Further, after balancing plaintiff-intervenor's speculative need to depose defense attorneys at the end of discovery deadlines and on the eve of trial with the significant disadvantages this creates with a party's right to receive and an attorney's duty to provide effective representation near the end of a long and difficult case, we opt for the latter based on the foregoing analysis.

It is therefore ordered that defendant Parish of Jefferson's motion to quash deposition notices and related subpoenas duces tecum served upon their attorneys of record be and is hereby GRANTED.

New Orleans, Louisiana, this 9th day of October, 1996.

/S/ Ivan Lemelle

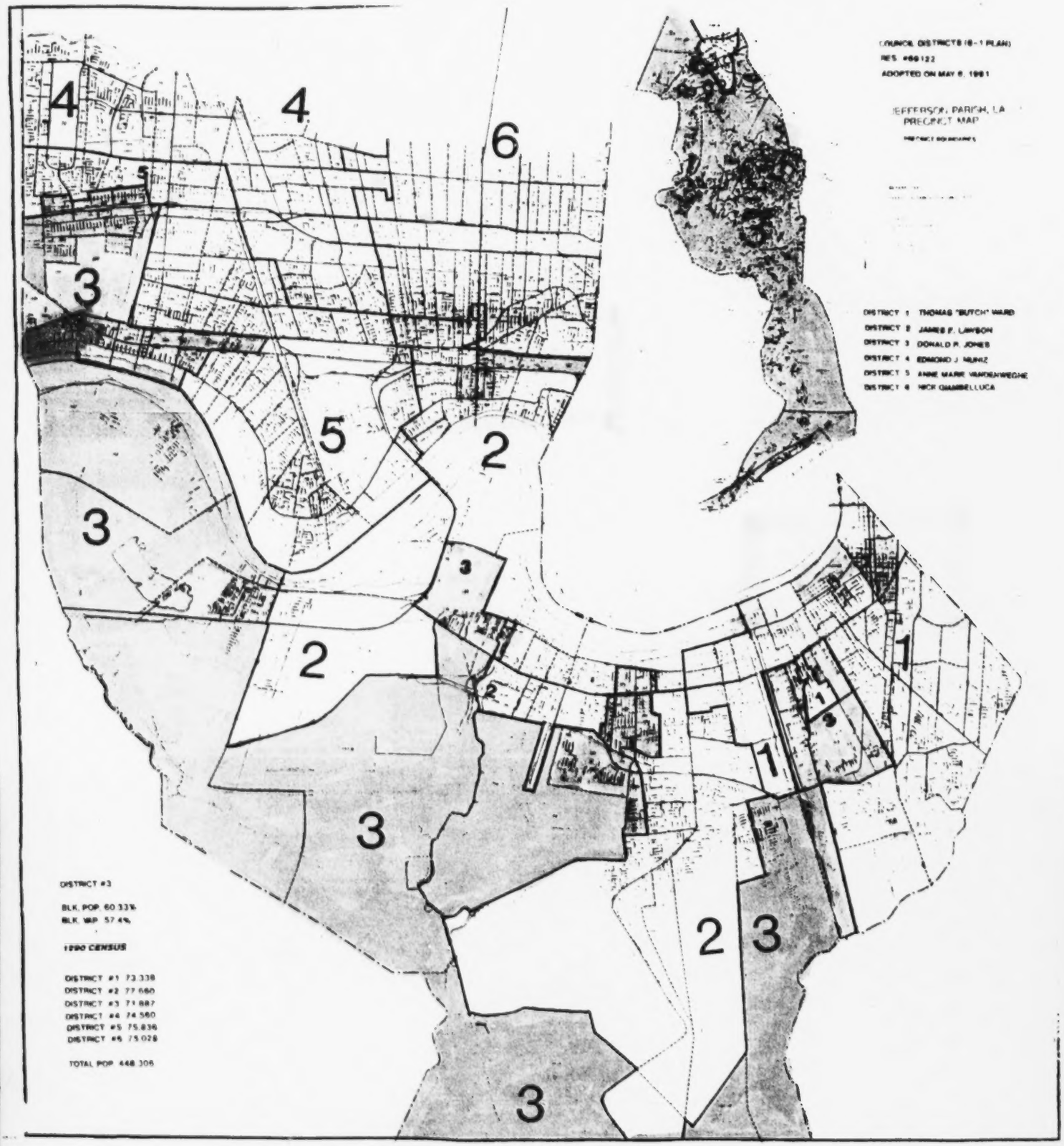
UNITED STATES MAGISTRATE JUDGE



MAP ONE - Current District 3 without Racial Characteristics

RED - Indicates all precincts drawn to be included within the current District 3.

BEST AVAILABLE COPY

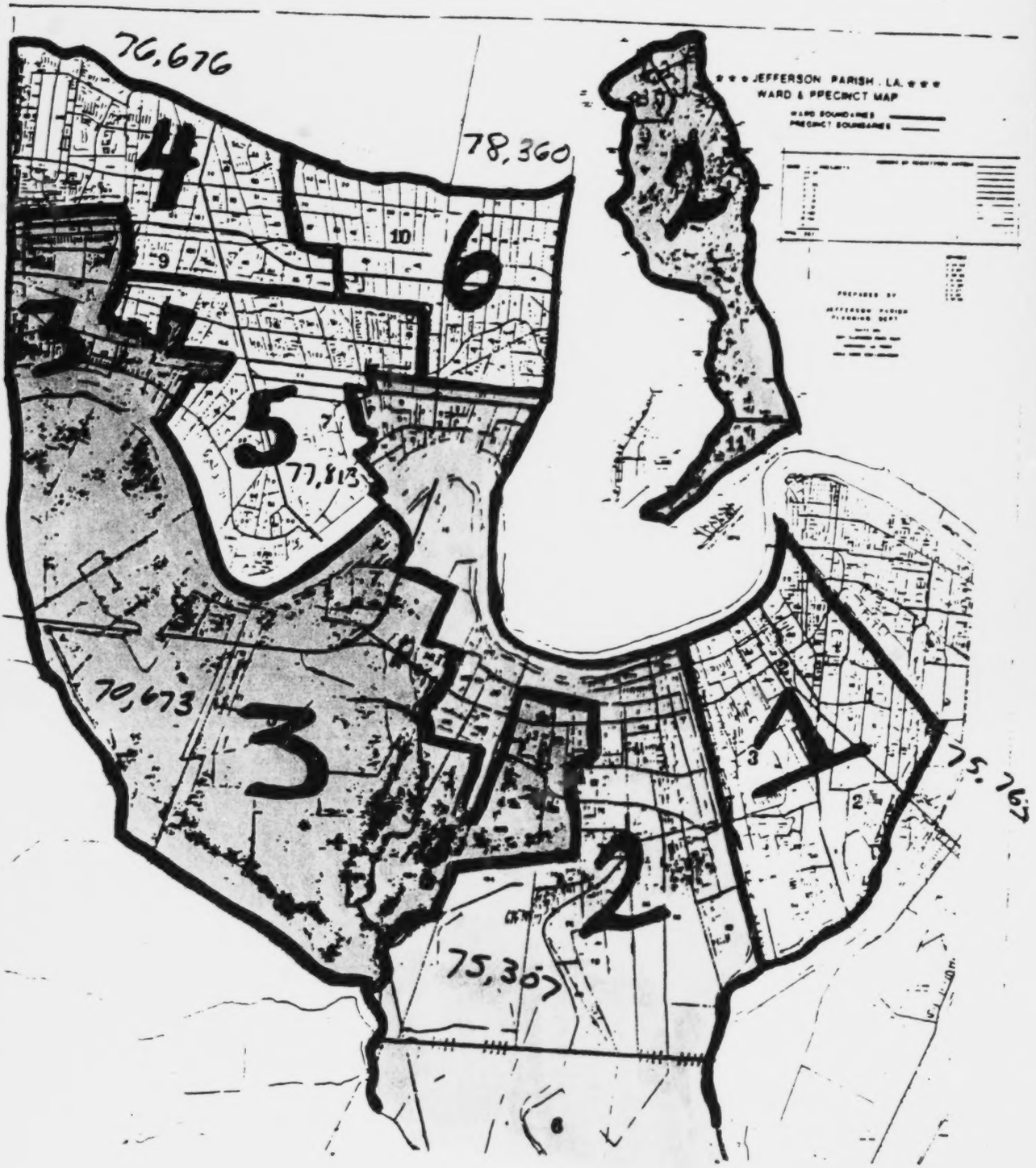


MAP TWO - District 3 with Racial Characteristics

BLUE - Indicates all **BVAP** majority precincts drawn to be included within the current District 3.

PINK - Indicates all white majority precincts drawn into the current District 3.

ORANGE SQUARES - Highlight the only two locations, also shaded **BLUE**, of **BVAP** majority precincts of the Parish not drawn into District 3. (The Gretna/McDonoughville and Shrewsbury Areas)



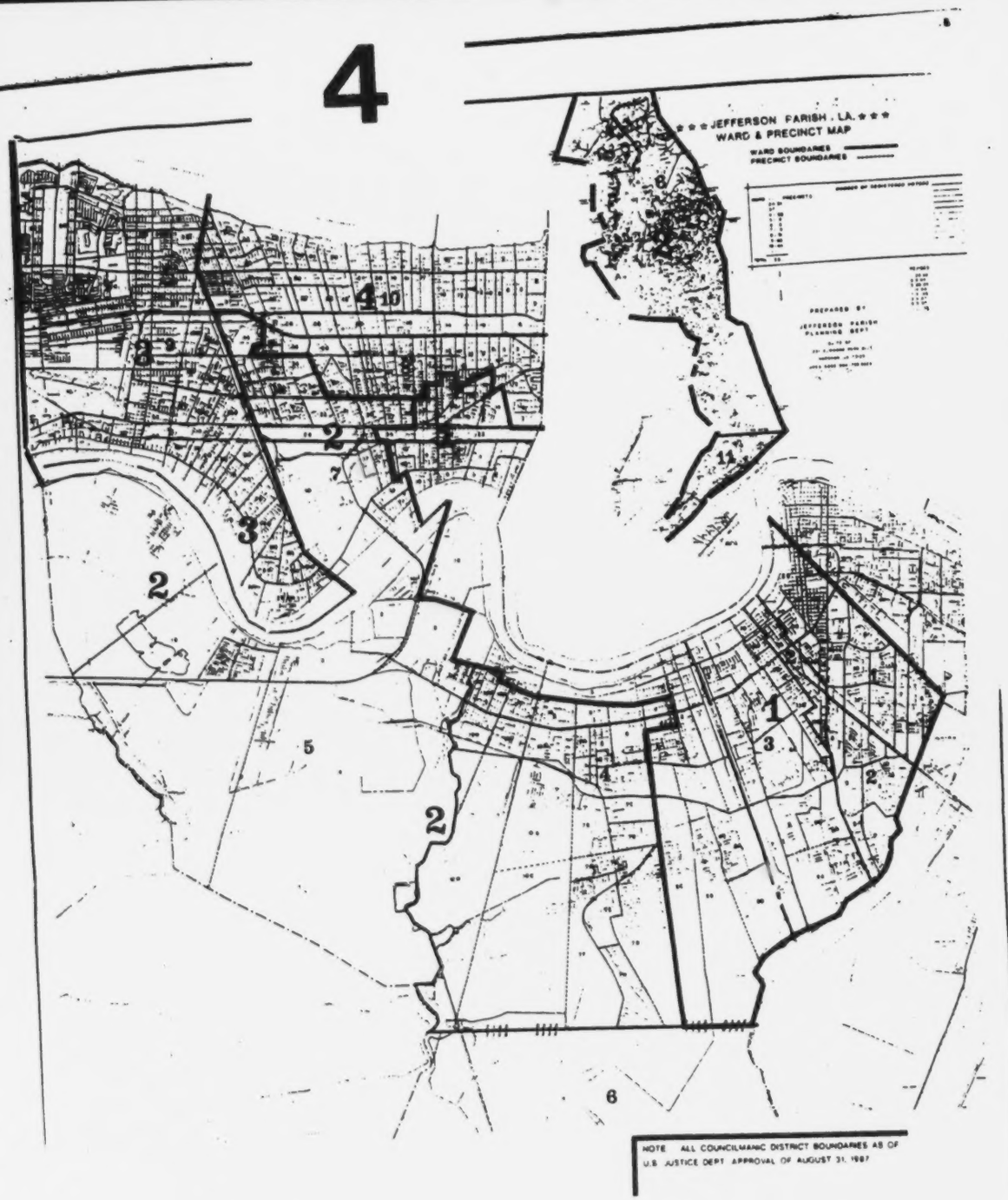
6 Single Member Districts
1 At-Large District
Black Majority District = District 3

MAP THREE - March, 1990 Interim " 6 -1 " Districting Plan.

BEST AVAILABLE COPY

MAP FOUR - February 1990 " 6 -1 " Interim Districting Plan.

Interim = 1 Judge Parish
Single Member
Districts = 1-6
Black Majority
District = 3



☆☆ COUNCILMANIC DISTRICT MAP ☆☆

CURRENT ELECTED OFFICIALS

ROBERT B. EVANS, JR.
CHAIRMAN

LLOYD F. GIARDINA
AT-LARGE DISTRICT # 1

ED MUNIZ
AT-LARGE DISTRICT # 2

LARRY HOOPER
DISTRICT # 3

THOMAS J. WARD
DISTRICT # 1

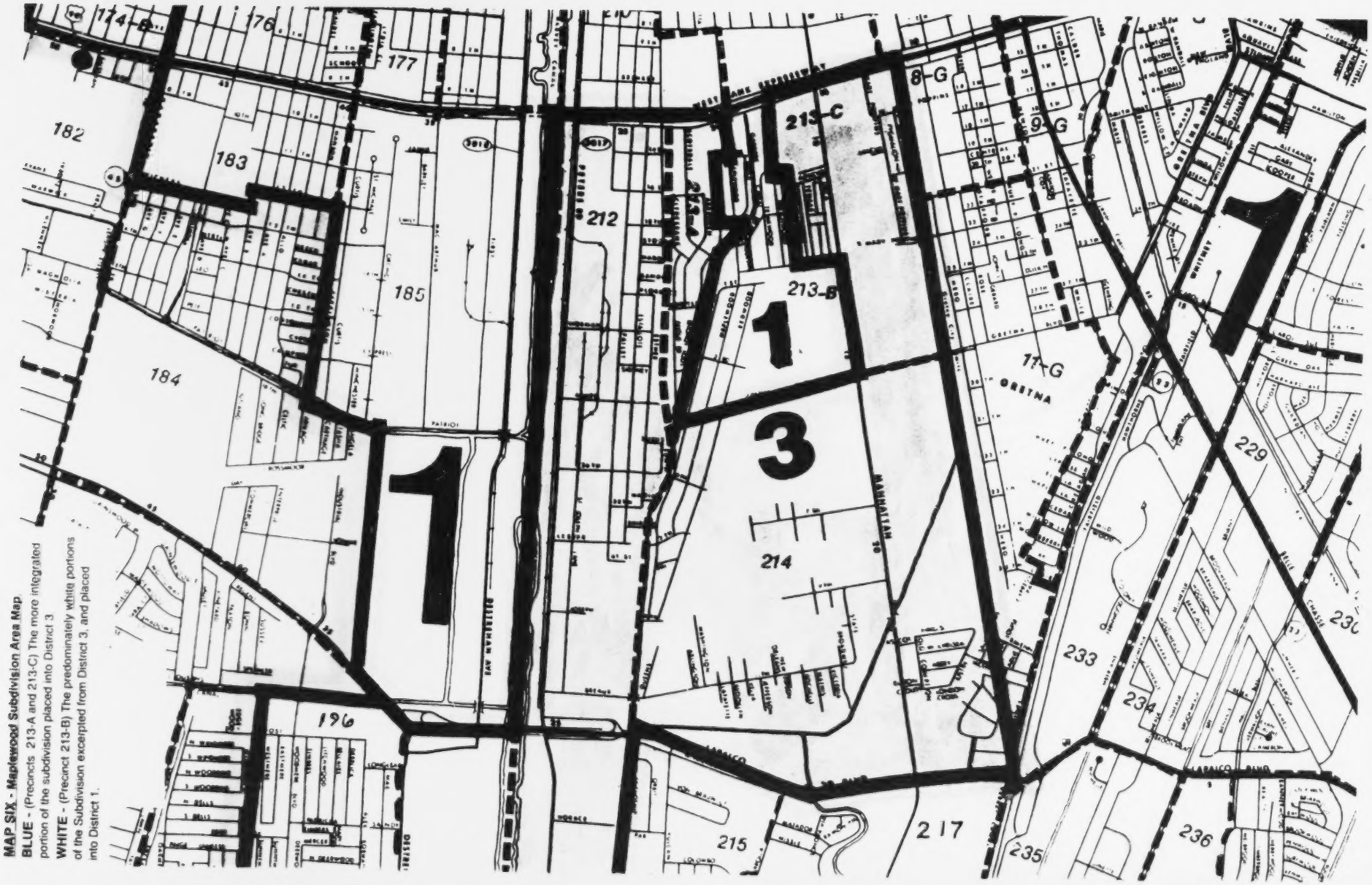
JAMES E. LAWSON JR.
DISTRICT # 2

ROBERT L. DEVINEY, JR.
DISTRICT # 4

REVISED AUGUST 31, 1987

PREPARED BY JEFFERSON PARISH PLANNING DEPT

MAP FIVE - " 4 - 2 -1" Districting Plan last used by the Parish to hold elections in 1987.



MAP SIX - Maplewood Subdivision Area Map

BLUE - (Precincts 213-A and 213-C) The more integrated portion of the subdivision placed into District 3

WHITE - (Precinct 213-B) The predominately white portions of the Subdivision excerpted from District 3, and placed into District 1.

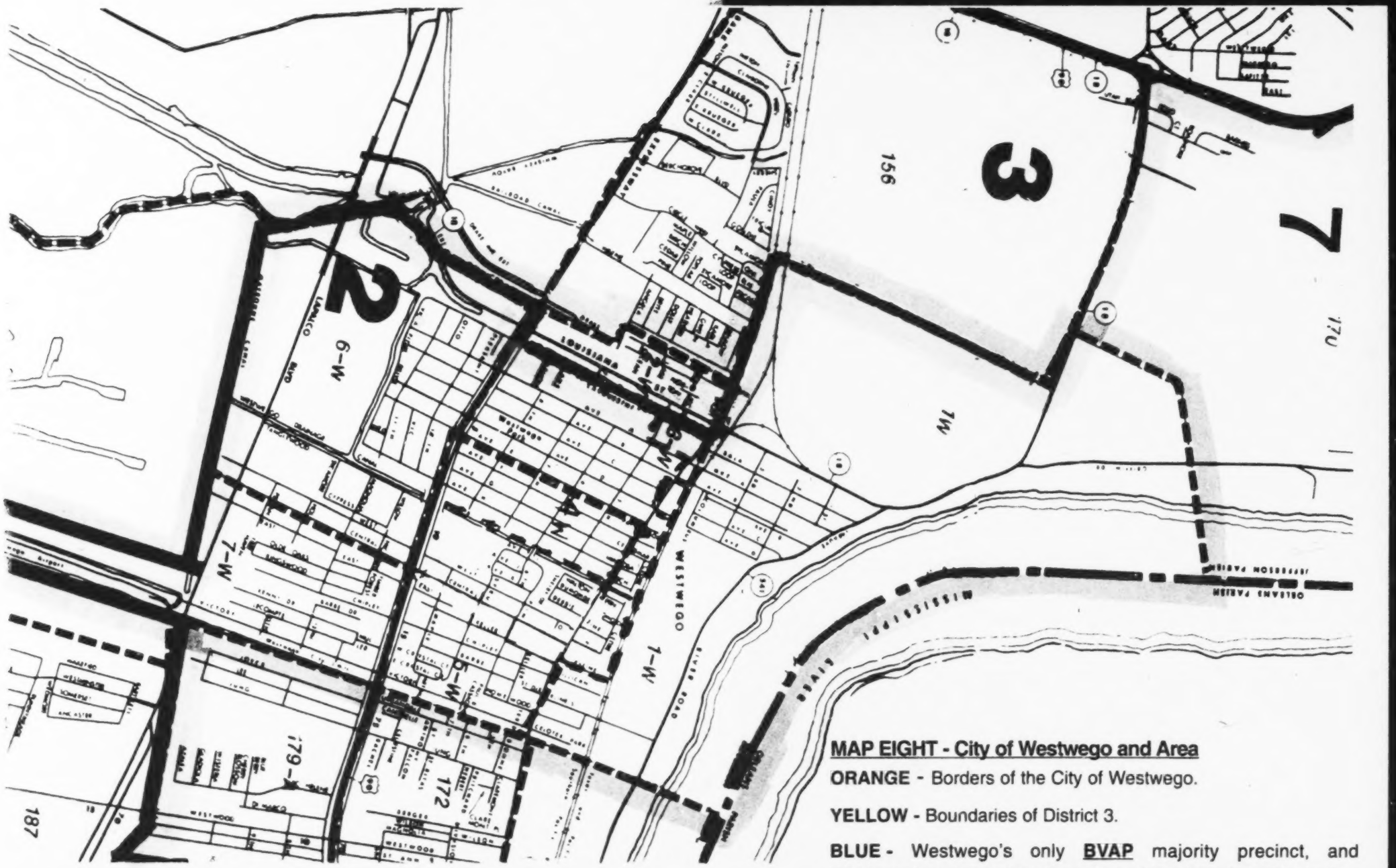
MAP SEVEN - City of Kenner and Surrounding Area

BLUE - **BVAP** majority precincts of the Kenner Area placed into District 3.

PINK - White majority precincts of the Kenner Area placed into District 3.

[redacted]

[redacted]



MAP EIGHT - City of Westwego and Area

ORANGE - Borders of the City of Westwego.

YELLOW - Boundaries of District 3.

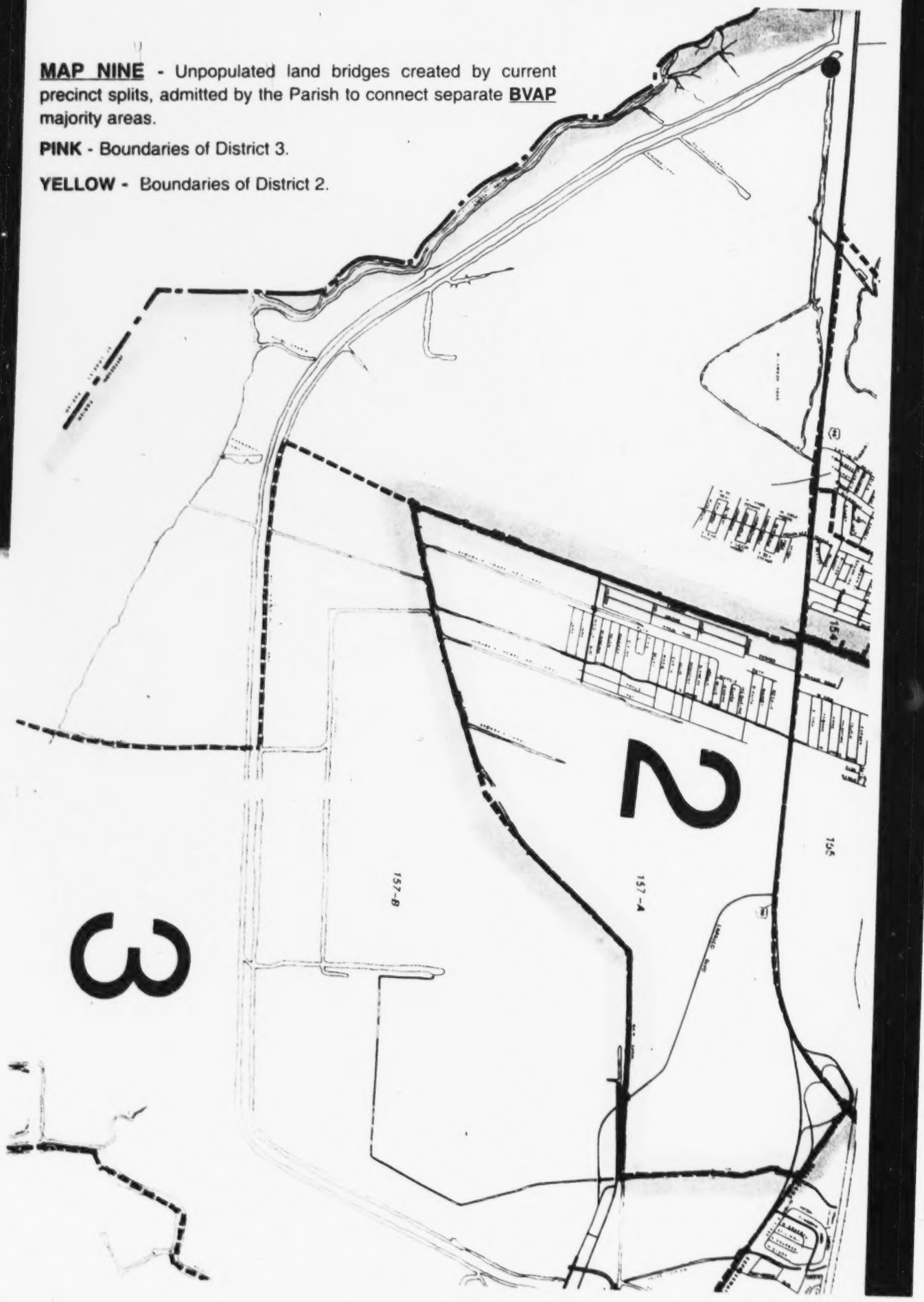
BLUE - Westwego's only **BVAP** majority precinct, and Westwego's only precinct drawn to be included within District 3.

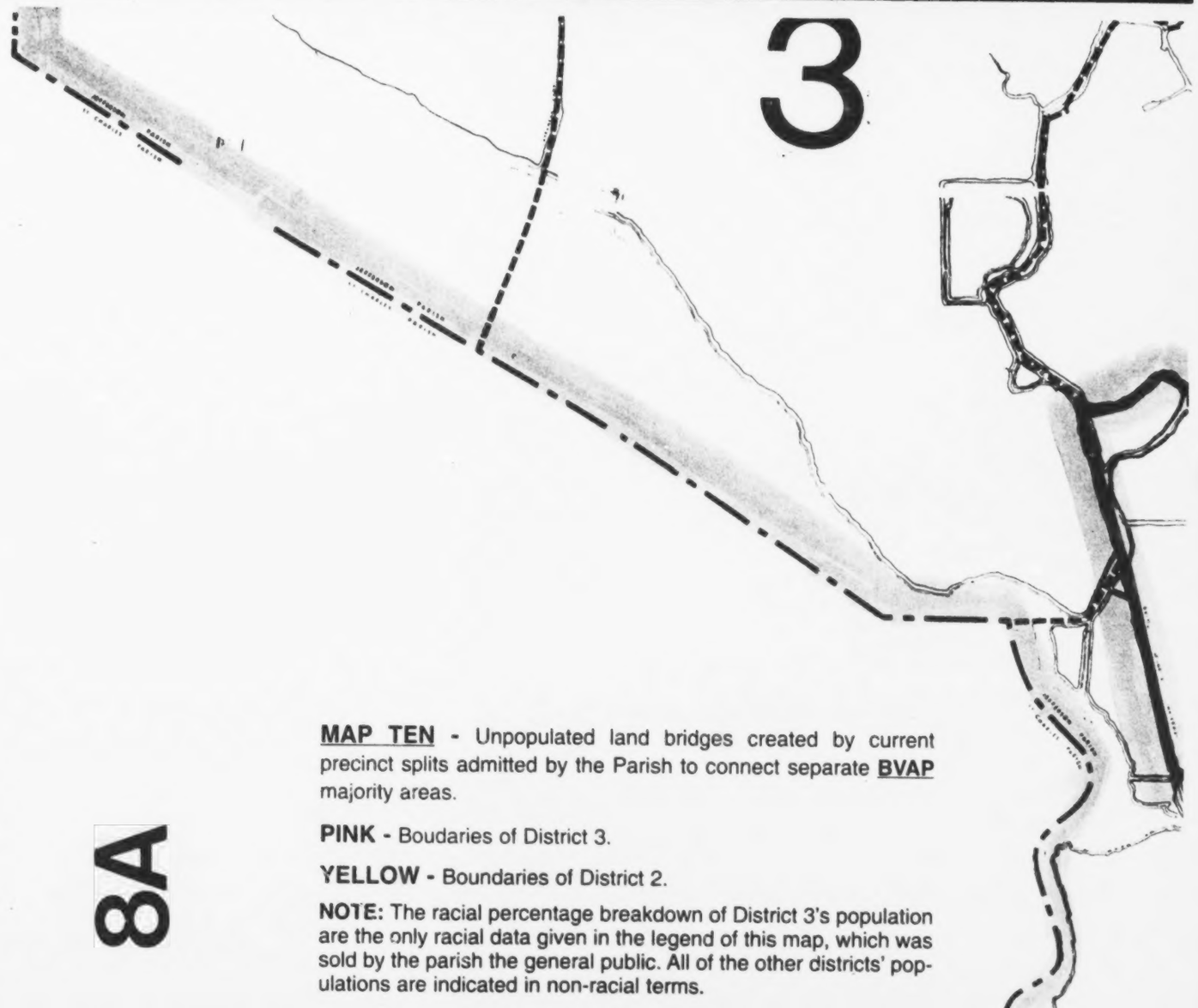
[redacted]

MAP NINE - Unpopulated land bridges created by current precinct splits, admitted by the Parish to connect separate **BVAP** majority areas.

PINK - Boundaries of District 3.

YELLOW - Boundaries of District 2.





DISTRICT #3

BLK. POP. 60.33%
BLK. VAP 57.4%

1990 CENSUS

DISTRICT #1 73,338
DISTRICT #2 77,660
DISTRICT #3 71,887
DISTRICT #4 74,560
DISTRICT #5 75,836
DISTRICT #6 75,025

TOTAL POP. 448,306

8A

MAP TEN - Unpopulated land bridges created by current precinct splits admitted by the Parish to connect separate **BVAP** majority areas.

PINK - Boudaries of District 3.

YELLOW - Boundaries of District 2.

NOTE: The racial percentage breakdown of District 3's population are the only racial data given in the legend of this map, which was sold by the parish the general public. All of the other districts' populations are indicated in non-racial terms.

APPENDIX G

JEFFERSON PARISH
LOUISIANA

JEFFERSON PARISH COUNCIL
RESEARCH & BUDGET ANALYSIS STAFF

Kenneth W. Hughes
Director

August 22, 1991

Mr. John Tanner
U. S. Justice Department
Civil Rights Division
H.O.L.C. Building
Room 716
Washington, D.C. 20001

EXHIBIT 8

Dear Mr. Tanner:

As per our telephone conversation as of this date, I am transmitting the following information to you by fax relative to the request for preclearance of the Jefferson Parish Councilmanic district reapportionment plan and the precinct and polling place changes adopted by the Jefforson Parish Council on August 21, 1991, necessary for the October 19th elections:

1) Emergency Ordinance No. 18357 which creates new precincts for the Councilmanic district reapportionment plan ordered to be implemented by the U.S. Fifth Circuit court of Appeals;

2) Resolution No. 69917, which names polling places for the precincts created by Emergency Ordinance At No. 18357;

3) Resolution No. 69896, which moves the polling place for Precinct 1-K;

4) Resolution No. 69898, which moves the pollinq place for Precinct 38;

5) Resolution No. 69899, which moves the polling place for Precinct 84;

6) Resolution No. 69900, which moves the polling place for Precinct 185; and

7) Resolution No. 69901, which moves the polling place for Pricinct 127.

Copies of all of these documents, with the exception of Resolution No. 69898, were faxed to you prior to adoption on Tuesday, August 20th.

The reasons for the division of precincts by Emergency Ordinance No. 18357 are as follows; Precincts One-L One Hundred Fifty Seven, One Hundred Ninety-Four and Two Hundred Forty-Six were divided to create "land bridges" to connect the areas in District 3, the black majority district. The portions of these precincts added to District 3 are not populated. Precincts Thirteen-K, One Hundred Seventy-Four, One Hundred Seventy-Nine, and Two Hundred Thirteen were divided to add black-majority areas of these

precincts to District 3. The addition of these areas enhanced both the black population and black VAP of District 3. The description of Precinct One Hundred Ninety-One was amended to conform with the description of said precinct in the 1990 Census data. All of these precincts were amended or divided in accordance with the plan ordered to be submitted for preclearance by the Fifth Circuit. Resolution No. 69917 assigned polling places to these new precincts so that the voters affected would vote at the nearest existing polling places within their Council districts.

You suggested to me that the usual submittals for preclearance of the "routine" polling place changes were unnecessary if I could certify to you that none of the precincts affected contained black majorities. Accordingly, the 1990 Census data for these precincts are as follows

Precinct	Total	White	Black	Other	Black%
1-K	1,357	1,233	54	70	4%
38	1,147	1,135	1	11	0.087%
84	1,110	1,077	6	27	0.54%
185	1,189	1,051	27	111	2.3%
127	1,422	1,402	8	12	0.56%

The polling places in Precincts 1-K, 38, 84 and 127 were moved because the existing polling place lessors wished to give up the polling places. The polling place for Precinct 185 was moved because the previous location was outside of the precinct, and a suitable location within the precinct became available.

You also asked me to forward to you the voter registration information by Council districts, if available. I have been

informed by the Jefferson Parish Registrar of Voters that the State Department of Elections does not plan to change its computer program to reflect the new Council districts with the divided precincts until the district plan is precleared by your department. The State has already input into its computer the Special Master plan ordered by Judge Beer, and is not 'willing to undo that work until the plan ordered by the Fifth Circuit which overruled the Special Master's plan is precleared.

If you need this voter registration information for preclearance, I suggest that you contact Elsie Cangelosi with the Louisiana Department of Elections at (504) 925-7885. if you need any other additional information, please contact me at (504) 364-2711.

Yours truly,
/s/ Alan M. Gandolfi
Alan M. Gandolfi
Research Analyst

AMG/na

cc: Mr. James Arceneaux, Assistant Parish Attorney
Ms. Nan Alessandra, Attorney-at-law

APPENDIX H

PHELPS DUNBAR
Counsellors at Law
TEXACO CENTER
400 POYDRAS STREET
NEW ORLEANS, LOUISIANA 70130-3245
(504) 566-1311

FACSIMILES (504) 568-9130 AND (504) 568-9007
August 15, 1991

FEDERAL EXPRESS)7871656660

Gerald W. Jones, Esq.
Section Chief, Voting Section
Civil Rights Division
Department of Justice
320 First Street, N.W.
Room 716
Washington, D.C. 20534

Re: Submission of Redistricting Proposal by the Jefferson Parish Council for Expedited Preclearance Under Section 5 of the Voting Rights Act

Dear Mr. Jones:

On behalf of the Jefferson Parish Council for the Parish of Jefferson, Louisiana, we are submitting the enclosed redistricting proposal to the Department of Justice for preclearance under Section 5 of the Voting Rights Act, as

amended, 42 U.S.C. § 1973(c). A copy of this redistricting proposal was previously given to John Tanner of the Department of Justice on May 15th while he was in New Orleans attending a status conference in this case. You should be aware that Mr. Tanner is well-acquainted with the facts of this case.

We are requesting expedited consideration of the enclosed redistricting plan under Section 5 for a number of reasons. First, the qualifying period for the councilmanic elections is September 3-5, 1991, and the councilmanic elections are scheduled to occur on October 19, 1991. Second, the Jefferson Parish Council agreed with the plaintiffs in the matter styled, "East Jefferson Coalition for Leadership and Development, et al. v. The Parish of Jefferson, et al.," Civil Action No. 86-3668, to seek expedited preclearance of the enclosed redistricting plan under Section 5 and consequently, both plaintiffs and the Jefferson Parish Council are desirous of having expedited consideration. Finally, and perhaps more importantly, both the district and appellate courts have recently entered Orders directing the Jefferson Parish Council to seek expedited preclearance review. (A copy of the district court's Order is attached hereto as Exhibit "A" and a copy of the Fifth Circuit's order is attached hereto as Exhibit "H").

The enclosed redistricting proposal is being submitted in accordance with an agreement reached in the matter styled, "East Jefferson Coalition for Leadership and Development, et al. v. The Parish of Jefferson, et al.," Civil

Action No. 86-3668, in the United States District Court for the Eastern District of Louisiana. (A copy of the agreement reached with the plaintiffs in that action (which is styled as a "Joint Stipulation") is attached hereto as Exhibit "B")., The facts leading up to the execution of this Joint Stipulation are relatively simple. On March 21, 1991, the United States Fifth Circuit Court of Appeals affirmed the trial court's finding that the present councilmanic structure is in violation of Section 2 of the Voting Rights Act. At the close of its opinion, the Court of Appeal remanded the case to the lower court to "permit the district court to supervise prompt implementation of the redistricting plan." See, East Jefferson Coalition v. The Parish of Jefferson, 926 F.2d 495 (5th Cir. 1991). The redistricting plan referenced in the Fifth Circuit's opinion was a six-and-one councilmanic scheme, with six single-member districts and one at-large. The redistricting plan also included a black majority councilmanic district, namely, District 3. Under the 1980 Census, the black population in District 3 was 51.21% and the black voting age population was 50.12%.

The redistricting plan referenced in the Fifth Circuit's opinion had been submitted to the Department of Justice for Section 5 preclearance under cover of letter dated March 27, 1990. (A copy of the preclearance submission is attached hereto as Exhibit "C"). Subsequently, we provided further information to the Department of Justice delineating various demographic information pertinent to the black majority councilmanic district. (A copy of our supplemental correspondence to the Department of Justice is attached

hereto as Exhibit "D"). On May 10, 1990, the Department of Justice precleared the redistricting plan under Section 5. (A copy of the Notice of Preclearance is attached hereto as Exhibit "E"). Subsequent to preclearance from' the Department of Justice, the district court entered an order accepting the redistricting plan as a proposed remedy.

As noted, in its remand order, the Fifth Circuit directed the district court to supervise prompt implementation of the redistricting plan. On remand, the district court held a status conference, acknowledging that the plan had to be modified to accord with the population variances triggered by the 1990 Decennial Census. Additionally, the district court encouraged all parties to work together in formulating the necessary modifications in an expedited fashion, scheduling a May 15, 1991 deadline for submission of a modified redistricting plan. As noted, Mr. Tanner was in attendance at this conference.

Pursuant to the district court's directives, the Jefferson Parish Council, receiving suggestions from plaintiffs as to effectuating changes to the black majority councilmanic district, modified the redistricting plan to accord with various changes wrought by the 1990 Census. Specifically, by Resolution No. 69122, passed on May 8, 1991, the Jefferson Parish Council adopted a modified redistricting plan. The plaintiffs in the pending suit have reviewed the Jefferson Parish Council's redistricting plan

and have emphatically agreed not to object to the modified redistricting plan. Additionally, as noted, both plaintiffs and the Jefferson Parish Council entered into a Joint Stipulation agreeing that the Parish would make every effort to ensure that the councilmanic elections would be held timely under the May 8th plan, and that the Parish would seek expedited preclearance before the Department of Justice. (A copy of the Joint Stipulation is attached hereto as Exhibit "B").

The modified redistricting proposal retains the six-and-one councilmanic scheme, with six single-member councilmanic districts and one at-large seat. In keeping with the prior redistricting proposal, the plan also includes a black majority councilmanic district, District 3, with a black population of 60.33% and a black voting age population of 57.40%. (A copy of the Council Resolution accepting the May 8th redistricting plan, plaintiffs' response to the redistricting plan, as well as a map and other pertinent geographic and population data, is attached hereto, in globo, as Exhibit "F"). A legal description of the modified redistricting plan is being formulated and will be forwarded no later than Wednesday, August 21, 1991.

In accordance with the district court's prior directive that we submit a modified redistricting plan to the district court on May 15th, the Parish of Jefferson filed its modified plan with the district court in-conjunction with a memorandum of law in support of the Council's proposal. (See, Exhibit "F").

However, at a meeting held by the trial court on May 15, 1991, the district court rejected the modified redistricting plan and opted for the appointment of a special master to draw up a redistricting proposal for the Court. Shortly after the Court opted for the appointment of a special master, the plaintiffs requested the district court to order the Parish to abide by the terms of the Joint Stipulation and submit the May 8th plan to the Department of Justice for preclearance. The Parish of Jefferson orally informed plaintiffs' counsel that it would take no further action pursuant to the Joint Stipulation in the absence of a court order in view of the statements made by the trial court at the May 15th status conference. The trial court ultimately denied plaintiffs' request for an injunction, and the plaintiffs thereafter filed an appeal with the Fifth Circuit. On June 10th, the special master, Ms. Patricia Lowrey, submitted a redistricting plan to the district court containing a black councilmanic district with a 49% black voting age population. On July 24, 1991, the trial court entered a Judgment implementing the redistricting plan drawn by the special master.

On appeal, the Fifth Circuit approved the modified redistricting plan submitted by the Jefferson Parish Council. Accordingly, the Fifth Circuit reversed the trial court's July 24th Judgment, and thereafter remanded the case to the lower court. In its remand order, the Fifth Circuit instructed the trial court to issue an injunction directing the Parish of Jefferson to submit the May 8th plan to the Department of Justice for expedited review under Section 5 of the Voting Rights Act and thereafter to order implementation of the

May 8th plan immediately upon receipt of the notice of pre-clearance. (A copy of the Fifth Circuit's ruling is attached hereto as Exhibit "H"). Pursuant to the mandate of the Fifth Circuit, the district court has now issued a judgment in accordance therewith (see, Exhibit "A"), and the Parish has complied as expeditiously as possible.

The modified redistricting plan now being submitted maintains the present seven-member Council.[1] However, unlike the present councilmanic structure and in keeping with the previous redistricting plan which the Department of Justice approved, the seven-member Council will be comprised of six single-member districts (Districts 1-6, respectively) and one at-large. The black majority councilmanic district in this modified redistricting plan has a black population of 60.33% and a black voting age population of 57.40% under the 1990 Decennial Census. In formulating the black majority councilmanic district, we received input from the plaintiffs in the pending action and from John Tanner, who was previously involved in working with all parties on the previous redistricting plan submitted in March of 1990. During the course of confecting the necessary changes, we were informed that in order to avoid retrogression, it was essential that the modified redistricting plan

[1] The present councilmanic structure in Jefferson Parish is composed of a seven-member Council which is represented by one councilman from District 1, one from District 2, one from District 3, and one from District 4. Additionally, there are two members of the Council who represent Districts 1 and 2 and, Districts 3 and 4, respectively. The seventh Council member is elected at-large.

have a black voting age population of at least 53% in District 3, the black majority councilmanic district.[2] This plan clearly meets that standard.

In an effort to facilitate expedited preclearance, we have enclosed relevant demographic and mapping information, as well as pertinent pleadings from both the district and appellate courts. In view of the imminency of the qualifying period for the councilmanic elections, and in view of both the district and appellate courts' directives that we seek expedited preclearance, the Jefferson Parish Council respectfully requests the modified redistricting plan be given expedited consideration. As referenced in the Fifth Circuit's opinion (Exhibit "H"), the May 8th plan is to be implemented immediately by the district court upon receipt of notice of preclearance from the Department of Justice.

Please be advised that the modified redistricting plan has necessitated precinct changes and polling place changes. Under cover of letter dated August 13, 1991, these proposed changes were submitted to the Department of Justice for preclearance. (A copy of the cover letter forwarding that sub-

2. When the 1990 U.S. Census was superimposed on the redistricting plan previously precleared by the Department of Justice in May of 1990, the black voting age population is approximately 53%. We confirmed that 53% would be the retrogression benchmark under the Department of Justice's practice and policy. As evidenced in the modified redistricting plan, the Jefferson Parish Council has sought to avoid any retrogressive effect by having a black voting age population in District 3 of 57.40%.

mission is attached hereto as Exhibit "G"). We request that the August 13th submission be considered in conjunction with this submission on an expedited basis, since the elections will not be allowed to proceed if precinct changes and polling place changes are not precleared simultaneously with the modified redistricting plan.

Please note that we have also received word from a representative of the Secretary of State's office that the State Attorney General has stated that unless the Parish has received preclearance from the Department of Justice prior to September 3rd (the opening of the qualifying period), then councilmanic candidates will not be allowed to qualify in the new districts. This statement obviously provides but another compelling reason for expedited preclearance consideration.

If you should need any further information or documentation to facilitate your Section 5 preclearance determination, please do not hesitate to contact me.

Thanking you for your usual assistance, and with best regards, I remain,

Sincerely,
PHELPS DUNBAR

By: /S/ M. Nan Alessandra

M. Nan Alessandra
400 Poydras Street
29th Floor
New Orleans, LA 70130-3245
(504) 566-1311
(504) 584-9297

270/blg/9785s
Enclosures

cc: Hon. Peter H. Beer (w/o encls.)
M. David Gelfand, Esq. (w/o encls.)
Anthony Messina, Esq. (w/o encls.)
Members of the Jefferson Parish Council (w/o encls.)

APPENDIX I

Appellate Advocacy Program

Tulane Law School
6801 Freret Street
New Orleans, Louisiana 70116-5670
(504) 865-5732

M. David Gelfand
Director

Terry E. Allbritton
Associate Director

Eileen I. Ryan
Legal Assistant

May 10, 1991

M. Nan Alessandra
Phelps, Dunbar, Marks, Claverie & Sims
Texaco Center
400 Poydras Street
New Orleans, Louisiana 70130

RE: East Jefferson Coalition v. Parish of Jefferson

Dear Ms. Alessandra:

The black majority district proposed by the Parish of Jefferson in its Resolution of May 8, 1991, is not the only way to draw a black majority district cosistant with the 1990 census. Other plans, with a more compact and aesthetic district, could be drawn.

However, the Parish's plan is not unacceptable to plaintiffs, and we do not oppose it. Thank You.

Sincerely,
/S/ M. David Gelfand
M. DAVID GELFAND
Counsel for Plaintiffs

A Program of Tulane University School of Law

APPENDIX J

Appellate Advocacy Program

Tulane Law School
6801 Freret Street
New Orleans, Louisiana 70116-5670
(504) 865-5732

M. David Gelfand
Director

Terry E. Allbritton
Associate Director

Eileen I. Ryan
Legal Assistant

May 10, 1991

John Tanner
DEPARTMENT OF JUSTICE
320 FIRST ST., N.W.
ROOM 716
WASHINGTON, DC 20035-6128

RE: East Jefferson Coalition v. Parish of Jefferson

Dear John:

As you know, I was very sorry to hear that you could not attend the June 24th hearing. I do appreciate your offering to confirm that you told both Nan and me that the benchmark for preclearance of a new plan would be the black VAP under the 1990 census, i.e. 52.3 percent in this case. We will both be describing our telephone conversations with you in our affidavits, as that information from you was a critical "ground rule" in our negotiations over the new plan. Hence, an affidavit from you would help.

Please find enclosed another copy of the special master's report. Please check Exhibit 4, which gives her statistics on her plan.

Thank You.

Sincerely,
/s/ David
M. David Gelfand

EXHIBIT K

FILED JUL 10 , 91

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

EAST JEFFERSON COALITION FOR LEADERSHTP, ETC, ET AL	*	CIVIL ACTION
versus	*	NO. 86-3668
	*	SECTION "M"
PARISH OF JEFFERSON, ETC, ET AL	*	

* * * * * * * * * * * * * *

TRANSCRIPT OF RULE 11 HEARING
JUNE 24, 1991, 4:00 PM
BEFORE THE HONORABLE PETER BEER
UNITED STATES DISTRICT JUDGE

APPEARANCES:
For the Plaintiff
Respondent: ALICE M. JACOBS, ESQUIRE
1421 N. Causeway Blvd., Suite 101
Metairie, Louisiana 70001-1874

JAMES K. GREEN, ESQUIRE
250 Australian Avenue South
Clearlake Centre, Suite 1300
West Palm Beach, Florida 33401

GAINSBURGH, BENJAMIN, FALLON,
DAVID & ATES
BY: ELDON E. FALLON, ESQUIRE
Energy Centre, Suite 2800
New Orleans, Louisiana 70160

For the Defendant
Respondent: Phelps Dunbar

BY: JAMES H. ROUSSEL, ESQUIRE
HARRY S. REDMON, JR.,
ESQUIRE
400 Poydras Street
30th Floor - Texaco.Center
New Orleans, Louisiana

INDEX OF WITNESSES

MARIA NAN ALESSANDRA (Respondent's Witness)
Direct Examination by Mr. Rychlak Page 15

TERRY EDWARD ALBRITTON (Respondent's Witness)
Direct Examination by Mr. Green Paqe 44

APPEARANCES (Continued):

For the Defendant
Respondent: RONALD J. RYCHLAK, ESQUIRE
University of Mississippi
University, Mississippi

Court Reporter: Rhonda J. Ballard, CSR
501 Magazine Street, Room 307
New Orleans, Louisiana 70130.
(504) 589-2861

concerned about Section 5, as well.
Q. Therefore, did you think you could accomplish your obligations with ministerial fine-tuning?
A. At that point I had no concept of what was involved. I had yet to sit down and look at any statistical information from the Parish. I was still contemplating my other avenues at this point.
Q. Did you believe the Judge had limited you to ministerial fine-tuning?
A. I think the Judge made it clear he liked the Plan that was in place. I don't think there was any doubt, I never doubted that for a second. I think the Council members liked it and we all realized once you impose that census we had to start readjusting those lines. We also realized we had the Department of Justice and the plaintiffs on the other side and we had to be cognizant of that as well.
Q. The deadline was set for May 15th. Was that also the date of the status to report to the Judge? of the status to report to the Judge?
A. my understanding, I think we were s.upposed to submit something to the Court at that time. something to the Court at that time.
Q. How did you go about preparing the new plan?

A. The first thing I did, I contacted some of the Parish representatives and my initial under standing was that the only thing I had to be concerned about was to get the one man one vote deviation since we were a legislative body we could go as

high as ten percent. That was one of my instructions. I thought we would be safe if we just had the a majority of the black voting age population in District 3. I thought that would satisfy Section 2 and Section 5. Our initial proposals, there might have been one or two, were based on trying to get that area in District 3 of a black voting age population of about fifty -- fifty-one percent. I had then at that time shown the figures, when you superimpose the figures of the 1990 census on that Plan, the six and one which had been the focal point of the Fifth Circuit opinion, there was a devia tion in districts, thirteen percent under the population ideal. In that close adjacent district, District 2, it was ten percent over the population ideal which indicated to me that we had a twenty-three percent population disparity over the population ideal and then I had to reduce that to ten percent. The first. proposals, I think we had tentatively scheduled a

meeting with the plaintiffs for April 29th. Between April 23rd which I think was the date of the Status Conference, and April 29th, just in that brief inter lude, there was a lot of newspaper coverage about exactly what was going on. I wrote a letter to the Judge because I was already concerned because it was a very one sided view of exactly what was going on. I copied opposing counsel and informed the Court I didn't want the negative press coverage to give any type of mischaracterization to what was basically transpiring. To put it quite succinctly, when we

21

went to the April 29th meeting, that proposal which.was probably the closest to the Plan was not considered by the plaintiffs and then informed us at that time they had been in contact with the Department of justice

Q. First of all, the letter to the Judge was attached to your affidavit as Exhibit B, correct?

A. Right.

Q. Additionally, one of your very first plans then was superimposing the 1990 census on the existing Plan?

A. That is absolutely right. That was the one I told you that was fairly close, it was only, however,

a fifty or fifty-one 12 percent black V-A-P. Once you had done that, you looked at this first Plan, the 1990 census superimposed on the old Plan, you noted all these difficulties, you said that the Department of Justice would have problems with it. Any other problems you anticipated if you went for ward with that Plan?

A. According to the plaintiffs' counsel, at the April 29th meeting, they had already been engaged in conversations with the Justice representative, John Tanner, and according to Mr. Tanner, he was going to insist that the Parish of Jefferson have some type of benchmark of fifty-three percent.

Q. Benchmark meaning what?

A. According to the Department of Justice, they were going to conclude that any voting age popula tion in District 3 which was

less-than fifty-three percent would be retrogressive.

Q. Fifty-three percent?

A. Black voting age population. To be quite honest with you, I did not react very well to that. I was pretty angry. I didn't think it was fair.

Q. What did you do?

A. I contacted John Tanner at the Department of Justice that this plan was never

implemented, are you telling the Parish that not only do they have to come up with black majority districts we have to have a black V-A-P of fifty-three percent? I don't think I can do it. Then after that conversation ended, I went in and looked at annotations under Section 5, it wasn't answering my question about why are we being penalized with using this Plan as the benchmark for retrogression when there had been no implementation. I called him back on the phone and I said, I looked at these cases and they don't really say that I am supposed to use this Plan now as this new benchmark forgetting this black V-A-P up to fifty-three percent. Do you know how difficult this is in Jefferson Parish? He basically said, Ms. Alessandra, this is the Department of Justice policy and practice to do just that. I went back to the Parish, told them from all further proposals we were trying to confect, using that Plan as the benchmark, we had to have at least a fifty-three percent black V-A-P. If you came in with less than fifty-three percent the

Department of Justice would object and what else may it do?

A. The plaintiffs had already made it plain if we were going to go forward and submit the Plan to

the Court and the Department of Justice they were going to oppose it. There was also the historical perspective I had in the case. In 1989 I did the submission, we had had a proposal with about approximately fifty six percent black population and we had heeded a directive in the memorandum opinion of the Court that you didn't really need a super majority to satisfy the remedial requirements and we got up to the Department of Justice, when we interposed objection, they said that the fact that the plaintiffs had shown them other plans with the majority, indicated to them we were trying to minimize the black voting strife and I didn't want that to happen again.

Q. You didn't want that to happen because--

A. For one thing, the first time we submitted the Plan, that had nothing to do with what we were accomplishing at this point. It certainly didn't have anything to do with what I was trying to accomplish at this time.

Q. You were afraid it would impact on the Parish itself?

A. If we got opposition from the Department of Justice, it meant we were going to come back to the phase of having to draw up a new proposal, just going to delay the elections.

Q. So at that point you decided to draw new lines?

A. Right.

Q. In drawing new lines, did you think you were complying with the Fifth Circuit Mandate.

A. You read the Fifth Circuit Mandate, I have gone back over and done a chronology just in connection with everything that has transpired recently and it says "Prompt implementation of this Plan." You can't implement that Plan as it stands because it's just not valid under the one man one vote principle. Once you bring it into the one man one vote, the Department of Justice now steps in and is going to superimpose a new requirement which is very, very difficult and that is that fifty-three percent black V-A-P.

THE COURT:- I've got to tell you one thing here to put it on the record so that everybody knows where everybody is coming from. None of this was ever transmitted to this Court in any way, shape or form. In any way, shape or form. Furthermore, as far as I am concerned, this guy from the Department of Justice, Tanner, whatever his name is, has no more standing in this Court as far as any of this is concerned than any other attorney who is involved in this. The notion that some substitution should be made for this Court's action following a mandate from the U.S. Court of Appeals for the Fifth Circuit, based on what Mr. Tanner or whoever has to say or not say is absolutely unacceptable as to be just

ludicrous. It is important for this record and for you and for Ms. Alessandra to understand that none of this was never brought to

the Court's attention at all. The only thing that has ever been brought to the Court's attention was some statement by Tanner in the course of one meeting that he attended where I had any contact with him, he somehow seemed to indicate he had some standing that certainly was never accorded to him in any way, shape or form by this Court or by anyone else that has to do with the judicial process of the United States Court of Appeal for the Fifth Circuit or the United States District Court for the Eastern District of Louisiana.. So, whereas anyone may, of course, listen to anyone that they want to lis ten to, nothing that has been reported to this Court as coming from Mr. Tann:er has any standing as far as this Court is concerned whatsoever. I don't know if Mr. Tanner is present in Court. I wouldn't recognize him if I saw him. I do know that whatever he says has absolutely no standing as far as I am con cerned in this case in any manner whatsoever, inso far as the fulfillment of the Mandate from the U.S. Court of Appeals is concerned. This is a judicial

process. I want to disabuse everybody of any notion that anything that Tanner says or does has any official sanction or capacity or recognition by this Court in connection with the carrying out of the Mandate of the United States Court of Appeals for the Fifth Circuit or the directions of this Court. it is important that that be made clear to everybody at this juncture for indeed Mr. Tanner doesn't speak for this Court or for the Fifth Circuit or has

any recognition or standing before this Court in any manner whatsoever, in any way, shape or form.

MR. RYCHLAK: We're well aware of that. However, the Order to Show Cause attributes wrongful intent to my client and what we are bringing forth is she believed she had to get a pre clearance..

THE COURT: I think you are in order bringing that out in that context and I think it is material, but I also think it is important to clarify where some opinion from Tanner stands as far as this Court is concerned either with respect to the matter overall or with respect to the matter of this Show-Cause Order.

MR. RYCHLAK: I understand. I completely accept it for purposes we are offering it as complete-

ly relevant.
THE WITNESS: May I say something? In February of 1990 he was one of the people that appended to the affidavit, he came in to the Court and was actively involved in the confection of that Plan that was ultimately pre-cleared by the Department of Justice.
THE COURT: I understand that. Ma'am, that doesn't give him any standing as some kind of officer to direct your actions or those of the plaintiffs. He is nothing more or less than an employee of the Department of Justice.
THE WITNESS: I wanted to clarify my position of his involvement in this case has been very, very active from the

27

Department of Justice from day one.
THE COURT: Okay, but you know my answer to that is what team did they ever lick? They don't have anything to do with this case as far as this Court and Your operations are concerned. They do their thing and we do ours. They don't have any standing here as far as I am concerned or as far as the Fifth Circuit is concerned to yeah or nay anything that this Court deals with in the ordinary course of the enforcement of its judicial processes. To assume that they do is an error that may very correctly be excusable, in the

sense of any ill will, but it certainly is important to have it clear that it has no standing here.

MR RYCHLAK: The other thing I would like to raise, Your Honor, is that it was directed by the Court that the defendant was to work with the plaintiff in putting this deal together and we had testimony already that says the plaintiffs were pointing to Tanner and saying we are not going to agree to any thing unless Tanner says it.

THE COURT: I'm not anymore enraptured with their overdignification of Tanner than your client. I'm just saying it isn't going to fly as a reason because he has no standing with respect to the judicial enforcement of judicial decrees of the Circuit or the District Court. None.

MR. RYCHLAK: We don't argue that he had supreme say here. I do say it greatly impacts on the intent of the

parties.

THE COURT: I understand that. I think it is material to the consideration of the whole Rule 11 proceeding. I don't quarrel with you for putting it in. I would be less than responsive to you all or frank with respect to the overall matter if I didn't address the points that I just addressed.

MR. RYCHLAK: I appreciate that, Your Honor.

BY MR. RYCHLAK:
Q. Picking up where we were, was there any intent to circumvent the Fifth Circuit Mandate?
A. Absolutely not.
Q. Any intent to disregard orders of the Court?
A. I was trying to do what we were instructed to do. Meet that May 15th deadline and get a plan I thought could be precleared and ultimately accepted by the Court.
Q. Did you, in fact, ultimately reach agreement with the plaintiffs, did you draw up a plan they were willing to go along with?
A. Basically at that point, on May 8th, by six to one Council vote, the Council said the Plan was acceptable. As I said before, Your Honor, there was an earlier proposal, had a much less black V-A-P and it was made clear by the plaintiffs they were going to vehemently object to that. We went back to the drawing board and ultimately came up with a plan that was passed six to one vote on May 8th. Two days after that I

received correspondence from plaintiffs' counsel indicating the Plan was not Acceptable. They also indicated that they would want me to agree to move for expedited pre-clearance from the Department of Justice and agree the elections would proceed.

We agreed to that. That was all on May 10th.
Q. How did you feel once the Council approved and the plaintiffs agreed?
A. Relieved. I thought we had done what we were obligated to do. I was eager to submit it to the Court.
Q. Did you, in fact, try to move up the status meeting?
A. I don't know if I was involved in that directly. My understanding from one of the plaintiffs' attorneys who contacted the Court's chambers and I think there was some Judicial Conference occurring and that wasn't feasible.
Q. 'Let's move now to the date of May 15th when the hearing was scheduled. What happened that morning?
A. I think that morning I did a very brief memorandum. Appending as an exhibit the modified Plan which the Council had accepted by resolution and I also appended some correspondence from the plaint office at approximately 11:39. Your Honor, you are absolutely correct that those papers I did not go into detail about retrogression, it was my idea that when I would meet with you later that day I would discuss the fact of retrogression, how the Department of Justice was basically had its nose in

everything we were doing and I didn't do that in the memorandum because I thought I would have an opportunity to talk about that later that afternoon to you. Why did you send the materials over before that meeting?

A. I at least wanted to give the Judge an opportunity to, before the meeting, to look at the modified Plan and ask me any questions that he might have as to why a line might have gone east instead of west, to ask me if he wanted me to go back to the drawing board or whatever, anything he wanted to ask me, I wanted him to have an opportunity before the Status Conference at 2:00 to look at that.

Q. Before noon a copy went to chambers and a copy was filed downstairs.

THE COURT: That is exactly right. I appreciated the courtesy. That doesn't, as far as I am concerned, make any difference, in my overall reaction to what took place. Her testimony is exactly correct on that point.

MR. RYCHLAK: There is a little more on this line.

BY MR. RYCHLAK:

Q. The hearing was schedule for 2:00. What time did you show up?

A. I got here about ten minutes to 2:00. I was walking down the corridor and I saw an acquaintance involved in the criminal sentencing procedure

with Judge Beer and I think there was a question as to who was going to go on first and I might have

APPENDIX L

Filed JUN 25 91

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

EAST JEFFERSON COALITION FOR LEADERSHIP AND DEVELOPMENT, ET AL.	* CIVIL * ACTION *
	* NO.
VERSUS	* 86-3668 *
THE PARISH OF JEFFERSON, ET AL.	* SECTION * "M" *MAG. DIV. 4

AFFIDAVIT OF M. NAN ALESSANDRA
IN OPPOSITION TO RULE TO SHOW
CAUSE WHY RULE 11 SANCTIONS
SHOULD NOT BE IMPOSED

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared, **M. NAN ALESSANDRA**, who, being first duly sworn, did depose and say:

(1) That she is an attorney in the private practice of law and is a member of the firm of Phelps Dunbar and that she represents the Jefferson Parish Council in the above-referenced action;

(2) That she was graduated *cum laude* from Loyola Law School in 1985;

(3) That during her final year in law school she worked as an extern for the Honorable Martin L.C. Feldman,

* * *

(50) That when the 1990 U.S. Census figures were superimposed on the Plan, the population in District 3 was 13% under the population ideal. Moreover, in District 2, the adjacent district, the population was approximately 10% over the population ideal. Accordingly, there was approximately a 23% population deviation in the Plan by virtue of the 1990 Census. (The computer data furnished by Jefferson Parish supporting these figures is attached hereto as Exhibit "D");

(51) That in view of the impermissible population deviation set forth in the Plan, she sought to effectuate necessary changes in compliance with the constitutional mandate of one man, one vote, as well as the state statutory provision governing apportionment of districts in accordance with the 1990 decennial census. La. R.S. 33:1411. The end result was to obtain no more than a maximum population deviation of 10%, which is legally permissible. Her efforts to attain this goal were successful, since the total population deviation in the Modified Plan is 7.7%. (See, Exhibit "C" attached to defendants' Memorandum in Support of the Jefferson Parish Council's Proposed Modified Redistricting Plan submitted on May 15, 1991). She also sought to comply with the statutory mandate of Sections 5 and 2 of the Voting Rights Act in effecting necessary changes. First, Section 5 mandates that any change with respect to racial minority voting strength not have a retrogressive effect. In this case, when the 1990 Census figures were superimposed

on the Plan, there was a black voting age population in District 3 of approximately 53% (52.83%). (For the data substantiating these figures, *see* Exhibit "D");

(52) That in view of Section 5's prohibition against any retrogressive effect, she concluded that the Jefferson Parish Council could not implement any voting change to the councilmanic districts which would reduce the black voting age population in District 3 to less than 53%;

(53) That the 53% black voting age population bench mark was confirmed by conversations with the Department of Justice's representative, John Tanner, as well as an independent investigation of the controlling legal authorities, namely, Beer v. United States, 425 U.S. 130, 141 (1976), and City of Rome v. United States, 446 U.S. 156, 185 (1980);

(54) That achieving a 53% bench mark for black voting age population in District 3 was extremely difficult, particularly since District 3 had a population which was 13% under the population ideal;

(55) That initially, she did not think that the bench mark for retrogression would be set by superimposing the 1990 Census on the Plan, since the Plan had never in fact been implemented. However, according to John Tanner, it is the practice of the Department of Justice to do just that;

(56) That since she was convinced that no redistricting plan could pass muster under Section 5 unless the black majority district contained at least a 53% black voting age population, she informed representatives of

Jefferson Parish that a 53% black voting age population in District 3 was an essential prerequisite to any proposal;

(57) That aside from complying with Section 5, she also sought to comply with Section 2, which mandates that remedial relief under Section 2 contain a majority of black voters in a single-member district. See, Overton v. City of Austin, 871 F.2d 529 (5th Cir. 1989). Indeed, she had authored an article last year addressing the pronouncements in Overton regarding the scope of remedial relief under Section 2. (See, Alessandra, "Constitutional Law and Civil Rights," Fifth Circuit Symposium, 36 Loy. L. Rev. 719, 745-746 (1990));

(58) That she strove to maintain at least a majority voting age population in view of her prior involvement with the submission of one of the Parish's prior redistricting plans in 1989. Specifically, in September of 1989, the Parish had submitted a redistricting plan to the Department of Justice with a 46% black population. On November 10, 1989, the Department of Justice interposed an objection to the plan, noting that alternative plans had been proposed by others indicating that a black majority district could have been created. Although the Parish had heeded this Court's directive in its Memorandum Decision of July 12, 1988 (p. 32) that a proposed minority district did not require a majority of black voters, the Department of Justice nonetheless opined that the Parish's proposal of a 46% black population might well have been...

* * *

* * *

strength. For example, in the Modified Plan, there are approximately seven precinct divisions. In reference to Precincts 13K, 157, 174, 179 and 213, these precincts were divided to separate predominantly black areas from predominantly white areas in each of these respective precincts, for inclusion of these black areas in District 3. In reference to Precincts 1-L and 246, these precincts were divided to create "bridges" around the predominantly white portions of the Lafitte area, which is a predominantly white area, for inclusion of these portions in District 3, the black majority councilmanic district. Such precinct splits were based on policy choices of the Council -- choices which preserved the elected integrity of the Council itself;

(62) That the mandate of the Fifth Circuit indicated that the case was being remanded to the district court to supervise prompt implementation of the Plan. This Court realized on remand that changes had to be made. She understood that in order to implement the Plan, it was necessary that the Plan conform with the requisites of Sections 2 and 5 of the Voting Rights Act, as well as the constitutional precept of one man, one vote. She therefore acted to effect the necessary changes in accordance with these controlling legal authorities based on the facts presented;

(63) That she submits that the Joint Stipulation which was filed on May 15th was entered into pursuant to her honest representation of the interests of the Jefferson Parish Council and in full compliance with the mandate of the Fifth Circuit and the directives of this Court;

(64) That she has reviewed the Lowrey Plan and is convinced that the Lowrey Plan only serves to under-

score the fact that effecting necessary changes to the Plan was not a routine step;

(65) That she would further point out that she would never consider the Lowrey Plan as a viable option for the Parish. First, the Lowrey Plan has a black voting age population in District 3 of only 49.51%. Hence, the Lowrey Plan does not comport with the scope of remedial relief under Section 2. Second, the Parish had previously submitted a redistricting plan to the Department of Justice for preclearance in September of 1989. This proposal, containing a black population of 46%, was rejected by the Department of Justice on the grounds that alternative plans had been proposed in which a black majority district could have been created. The Department of Justice then concluded that the use of a 46% black population might well have been motivated by an invidious discriminatory purpose to minimize black voting strength. In view of this historical perspective, she would not have considered submitting the Lowrey Plan, since the proposed minority district does not have a black majority voting age population. Another reason ruling out the Lowrey Plan as a viable option is the fact that a 49.51% black voting age population has a retrogressive effect in violation of Section 5. The Department of Justice would not preclear this plan and she would have therefore been derelict in her duty if she had condoned any plan which fell underneath the 53% retrogression bench mark. She observed that the need to avoid retrogression and to maintain at least a 53% black voting age population in District 3 had a profound effect on the district lines in the Plan. Indeed, in view of the fact that the 1990 Census indicated that the population in District 3 was almost 13% under the population ideal, it was extremely difficult to attain a 53% black voting age population in that district. The ultimate effect of the need to

avoid retrogression was that the district lines had to be altered and the change of one district line necessarily had an effect on the others;

(66) That she was guided by the foregoing facts and legal principles, as well as this Court's directive that the parties work together, in entering into and signing the Joint Stipulation on May 15, 1991;

(67) That she did not enter into the Joint Stipulation for any improper purpose, but rather was guided by one objective: to ensure that any modifications to the Plan comported with the statutory directives of Sections 2 and 5 of the Voting Rights Act, the constitutional precept of one man, one vote, and the directives of this Court that these changes be effected in an expedited fashion with the agreement of counsel;

* * *

Supreme Court, U.S.
FILED
APR 14 2000

(4)

No. 99-1203

IN THE

Supreme Court of the United States

DENNIS THERIOT, *et al.*,

Petitioners,

v.

PARISH OF JEFFERSON, STATE OF LOUISIANA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF THE PARISH OF JEFFERSON, STATE OF LOUISIANA, RESPONDENTS

ROY J. RODNEY, JR.
KIM M. BOYLE
RODNEY, BORDENAVE, BOYKIN, BENNETTE & BOYLE
400 Poydras Street, 24th Floor
New Orleans, LA 70130
(504) 527-5450

HARRY ROSENBERG
Counsel of Record
M. NAN ALESSANDRA
PHELPS DUNBAR, L.L.P.
400 Poydras Street, 30th Floor
New Orleans, LA 70130-3245
(504) 566-1311

Counsel for the Parish of Jefferson, State of Louisiana, Respondents

159144

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

32pp

QUESTION PRESENTED

Whether the United States Court of Appeals for the Fifth Circuit clearly erred in affirming the district court's factual findings that the Jefferson Parish Council's creation of one council district with a black voting age population majority of 57.40%, done in compliance with the Fifth Circuit Order that it create a black voting age population majority district to remedy a violation under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, an order that is not challenged by Petitioners, was not predominantly motivated by race.

TABLE OF CONTENTS

	Page
Question Presented	i
Table Of Contents	ii
Table Of Cited Authorities	iv
Statement Of The Case	1
A. Statement Of Facts	1
I. The Geography and Topography of Jefferson Parish.	2
II. The *EJC* Litigation.	3
III. Developments Post-1990 Census.	6
B. Course Of Proceedings And Disposition In Courts Below	11
Summary Of Arguments For Denying Writ	12
Argument	14
A. Petitioners' Complaint Is Simply That The Lower Courts Did Not Believe Their Proffered Evidence. There Is No New Substantive Holding As A Result Of The Decision Below, Nor Is There A Conflict Among The Circuits That Warrants Review By This Court.	14

Contents

Page

B. Petitioners Have Sought Review On The Issue Of Whether The Boundaries Of The New District 3 Were Supported By A Compelling State Interest. That Issue Was Not Reached By The Fifth Circuit. 20

C. Petitioners Have Sought To Refashion The Issues They Presented To The Lower Courts And Which Were Adjudicated By The Lower Courts By Contending That The Issue Of Retrogression Was A Linchpin In This Case; It Was Not. The Lower Courts Did Not Hold That The Parish Of Jefferson Was Required To Meet A Benchmark And It Is Inappropriate For Petitioners To Seek To Sidestep The Lower Courts' Factual Findings Through Certiorari Review. 22

Conclusion 25

TABLE OF CITED AUTHORITIES

Page

Cases:

Abrams v. Johnson, 521 U.S. 74, 117 S. Ct. 1925 (1997) 19, 23

Beer v. United States, 425 U.S. 130, 96 S. Ct. 1357 (1976) 22, 23

Bush v. Vera, 517 U.S. 952, 116 S. Ct. 1941 (1996) 15, 16, 19, 20

California Dental Ass'n v. F.T.C., 526 U.S. 756, 119 S. Ct. 1604 (1999) 13

Cedric Floyd v. Parish of Jefferson, C.A. 86-0265 (E.D. La.) 4

DeWitt v. Wilson, 856 F. Supp. 1409 (E.D. Cal. 1994), *summarily aff'd*, 115 S. Ct. 2637 (1995) 20

East Jefferson Coalition v. Parish of Jefferson, 706 F. Supp. 470 (E.D. La. 1989) 5

East Jefferson Coalition v. Parish of Jefferson, 926 F.2d 487 (5th Cir. 1991) 5

East Jefferson Coalition for Leadership and Development v. The Parish of Jefferson, C.A. No. 86-3668 ..... 3, 4, 5, 6, 7, 13, 17, 19

Cited Authorities

	Page
Gilbert v. Homar, 520 U.S. 924, 117 S. Ct. 1807 (1997)	21
Grisbaum v. McKeithen, 336 F. Supp. 267 (E.D. La. 1971)	4
Miller v. Johnson, 515 U.S. 900, 115 S. Ct. 2475 (1995)	15, 16, 19, 20
Reno v. Bossier Parish School Board, 120 S. Ct. 866 (2000)	23
Rogers v. Lodge, 458 U.S. 613, 102 S. Ct. 3272 (1982)	15
Shaw v. Hunt, 517 U.S. 899, 116 S. Ct. 1894 (1996)	16
Shaw v. Reno, 509 U.S. 630, 113 S. Ct. 2816 (1993)	21
United States v. Board of Supervisors of Warren Co., Mississippi, 429 U.S. 642, 97 S. Ct. 833 (1977)	24
United States v. O'Hagan, 521 U.S. 642, 117 S. Ct. 2199 (1997)	13
White v. Regester, 412 U.S. 755, 93 S. Ct. 2332 (1973)	16

Cited Authorities

Page

Statutes:

42 U.S.C. § 1973 ..... i, 4, 5, 9, 10, 12, 13

42 U.S.C. § 1973c 5, 9, 12, 13, 22, 23, 24

United States Constitution:

Fourteenth Amendment 1, 11, 12, 14, 19

Rule:

Supreme Court Rule 14.5 11

Other Authorities:

28 C.F.R. § 51.54(b)(1) (1999) 23

The Parish of Jefferson[1] respectfully represents:

STATEMENT OF THE CASE

A. Statement Of Facts

Petitioners seek review by this Court of a decision by the United States Court of Appeals for the Fifth Circuit, which rejected Petitioners' constitutional challenge under the Fourteenth Amendment of the United States Constitution to the councilmanic districts in Jefferson Parish. Petitioners alleged that race predominated in the drawing of the districts, even though the Parish had acted to comply with a Fifth Circuit order requiring a black voting age majority district, and even though its plan had been approved by the district court. In its Order and Reasons in this case, the district court concluded that "while [race] was a factor, it is clear that political incumbency drove the pencil in designing these districts." The district court further noted that "[o]ther factors . . . at work [in the redistricting process] were (1) the need to maintain a one person/one vote ratio in the overall makeup of these districts, (2) the geographic realities of this [P]arish, including considerations with respect to contiguity and compactness, and (3) other traditional districting principles." App. at A-36. On appeal, the Fifth Circuit noted the district court had determined that past redistricting traditions in

---

1. The other Respondents represented by undersigned counsel are: Timothy Coulon, in his official capacity as President of Jefferson Parish; Aaron Broussard, in his official capacity as Chairman of the Jefferson Parish Council; and T.J. "Butch" Ward, Lloyd F. Giardina, Donald Jones, Edmond Muniz, John Lavarine and Nick Giambelluca, all in their official capacities as members of the Jefferson Parish Council (hereinafter collectively referred to as the "Parish of Jefferson").

Jefferson Parish had not strictly adhered to geometric standards of compactness. App. at A-20. The appeals court also noted that the district court had determined that the "very irregular" geography and topography of the Parish (including the fact that it is fifty percent water) substantially limits the ability of the Parish to adhere to such standards. Like the district court, the appeals court affirmed the lower court's determination that any irregularity associated with the shape of District 3 was not driven predominantly by race, but rather was derivative of politics, adjoining communities of interest, one person/one vote concerns, and the geography and population distribution in the Parish. App. at A-20 – A-21.

As detailed below, there is no reason for this Court's review of the Petitioners' fact-bound contentions which have been soundly rejected both by the district and appellate courts.

I. The Geography and Topography of Jefferson Parish.

In examining any redistricting scheme in the Parish of Jefferson, it its important to recognize the geography and topography of this unique area. David Creed, an expert demographer, who testified at trial in this proceeding, explained that Jefferson Parish is one of the most irregularly shaped parishes in the State of Louisiana, running in a north-south direction. The Parish is not rectangular; rather, it is elongated and twisted toward the bottom. Moreover, a large portion of Jefferson Parish is comprised of marsh land, canals, and waterways. The Parish of Jefferson's unique shape is influenced by the fact that it is located on both sides of the winding Mississippi River, making it very difficult to draw smooth-looking rectangular boundaries. The Parish

runs from Lake Pontchartrain on the north all the way down to Grand Isle in the Gulf of Mexico and includes a number of cities. In many cases, the areas between these cities are nothing but moist and open land. Quite often it is necessary to create elongated districts to connect these cities in order to satisfy the constitutional mandate of one person/one vote. The Mississippi River, running from west to east, divides the Parish in two. The northern portion, because of its connection to the eastern half of the continent, is called the East Bank; the southern portion is the West Bank. In the past, the division between the East Bank and the West Bank shaped redistricting schemes which were, of course, impacted by the unique geography and topography of the Parish.

II. The *EJC* Litigation.

The Parish of Jefferson is a political subdivision of the State of Louisiana. The Jefferson Parish Home Rule Charter provides that the seven-member Council is the legislative and policy-making body of the Parish, with the Parish President acting as the chief administrative officer. Pursuant to the previous Jefferson Parish Home Rule Charter in effect in 1986 when the lawsuit entitled *East Jefferson Coalition for Leadership and Development v. The Parish of Jefferson*, C.A. No. 86-3668 (the "*EJC* litigation"), was filed, the seven members of the Council were elected as follows: one councilmember was elected at-large (the Council Chairman); two councilmembers were elected quasi-at-large, that is, one was elected from Districts 1 and 2 combined (the West Bank); and another was elected from Districts 3 and 4 combined (the East Bank); the remaining four councilmembers were elected from each of the four separate councilmanic Districts, 1, 2, 3 and 4. This plan was often referred to as the 4-2-1

plan.[2] In 1986, private plaintiffs brought a challenge under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 ("Section 2"), and the United States Constitution, challenging the "4-2-1" method of electing the Jefferson Parish Council. The *EJC* plaintiffs alleged that the councilmanic configuration that existed in 1986 diluted their voting strength and had the effect of negating their vote in councilmanic elections.[3]

After two years of protracted litigation, the district court in *EJC* ruled that the Parish's councilmanic electoral scheme violated Section 2 of the Voting Rights Act. The *EJC* court's factual findings and conclusions of law are reported at 691

---

2. In 1971, a district court found that the districting plan for the Parish Council was malapportioned and replaced it with a plan that satisfied the constitutional one person/one vote standard. *Grisbaum v. McKeithen*, 336 F. Supp. 267 (E.D. La. 1971). In the court-ordered plan, two of the four single-member districts crossed the Mississippi River in order to remedy the malapportionment of the existing districts. In January of 1986, another reapportionment suit was filed, *Cedric Floyd v. Parish of Jefferson*, C.A. 86-0265 (E.D. La.). In 1987, as a result of that suit, the Parish reapportioned its districts once again.

3. Under the 1980 United States Census, which applied at the time the *EJC* lawsuit was filed, African-Americans in Jefferson Parish comprised 13.86% of the total population, and 11.78% of the voting age population. Jefferson Parish then had a total population of 454,592 persons and an African-American population of 63,001. According to the 1980 census, the voting age population at that time was 314,323 persons, of whom 268,878 were white and 37,039 were African-American. In the four elections held prior to the 1991 Jefferson Parish councilmanic race, four African-American candidates sought seats on the Parish Council, and no African-American candidate had been elected in any of these races.

F. Supp. 991 (E.D. La. 1988). The district court in this case took judicial notice of the facts in the *EJC* action. After the *EJC* court's initial liability finding, the Parish proposed a "6-2-1" plan, which would have increased the size of the Council from seven to nine members and provided for the election of six members from single-member districts, two members from single-member "superdistricts," and one member at large. This plan created no black majority districts; District 3, under the Parish's proposed plan, had a 45.9% black population. *East Jefferson Coalition v. Parish of Jefferson*, 706 F. Supp. 470, 472 (E.D. La. 1989).

The *EJC* court tentatively approved the Parish plan with one modification: the elimination of the two superdistricts. After the Department of Justice ("DOJ") interposed an objection to the districting plan pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c; both parties to the *EJC* case later agreed upon a revised "6-1" districting plan that created one black-majority district (District 3) with a total black population of 51.7%, according to the 1980 Census. The DOJ precleared this plan and the district court entered an order accepting the precleared plan as the proper remedy to the violations of § 2 of the Voting Rights Act. On March 21, 1991, the Fifth Circuit affirmed the district court's finding in the *EJC* litigation that the then-existing councilmanic structure violated Section 2 of the Voting Rights Act of 1965. *See East Jefferson Coalition v. Parish of Jefferson*, 926 F.2d 487 (5th Cir. 1991). The Fifth Circuit also remanded the case to the district court to "permit the district court to supervise prompt implementation of the redistricting plan."

III. Developments Post-1990 Census.

After remand from the Fifth Circuit's March 21, 1991 ruling, the district court in the *EJC* litigation held a status conference stating that the plan had to be modified to be in accord with the population variances triggered by the 1990 Census.[4] In early 1991, the 1990 Census data for Jefferson Parish was released and revealed that there were substantial population shifts among the districts in the newly created districting plan in terms of total population. In addition, the 1990 Census data showed that District 3 in the precleared plan had a black voting age population ("BVAP") of 52.3%.[5] Pursuant to the district court's directives, the Jefferson Parish Council modified the redistricting plan to take into account various population changes necessitated by the 1990 Census. Several redistricting plans were considered by the Jefferson Parish Council prior to the adoption of the final plan. Jefferson Parish's interest in avoiding contests between incumbent councilmembers primarily influenced the design of the challenged districting plan. As the district court cogently observed in this case, while "Plaintiffs contend that race was predominant . . . it is clear that political incumbency

---

4. The district court also encouraged the parties to work together to formulate the necessary modifications in an expedited fashion and to adhere to a May 15, 1991 deadline for submission of a modified redistricting plan.

5. Under the 1990 Census, Jefferson Parish had a total population of 448,306 persons, of whom 331,894 (74.0%) were white and 78,263 (17.5%) were African-American. The voting age population at that time was 315,765 persons, of whom 266,962 were white and 48,803 were African-Americans. African-Americans in Jefferson Parish then comprised approximately 15% of the voting age population.

drove the pencil in designing these districts." App. at A-48.[6] Stated another way, political preservation was paramount.

The focus of most of the discussions among the Parish Council during the 1991 redistricting negotiations with the *EJC* plaintiffs was West Bank political concerns. In particular, Councilmembers James Lawson and Lloyd Giardina knew that they were likely to run against each other in District 2. The resulting (and presently challenged plan) was dubbed the "Lawson Plan" primarily because many of the modifications to the *EJC* plaintiffs' proposed District 3 were made at the behest of District 2 incumbent, James Lawson.[7] During trial, both Lawson and Giardina testified that the configuration of Districts 2 and 3 (which aided Lawson) was the deciding factor in Lawson's victory.[8] The district court also received substantial trial evidence that

---

6. The *EJC* plaintiffs proposed an alternative plan that the Parish councilmembers chose not to adopt and that contained one black-majority district (District 3) in which black voting age persons represented approximately 55% of the population. The Parish Council did not accept the Petitioners' plan because "it totally eschewed all principles of incumbency and traditional geographic districts in Jefferson Parish . . ." App. at A-52.

7. Lawson and Giardina both vied for the District 2 seat in 1991. In an extremely close and acrimonious election contest, Lawson was elected.

8. Councilmember Giardina opposed Lawson's plan because Giardina's residence was placed in District 1, which was a political disadvantage to a District 2 candidate. Giardina testified that Lawson exploited this residency issue during the campaign and it contributed to Giardina's loss in 1991. The district court recognized these facts as contributing to the political scheme behind the councilmanic configuration.

Giardina, the losing candidate, lost because of the configuration of the councilmanic districts that favored the victor, Lawson. Lawson and Giardina agreed that the districts had been designed to get Lawson elected. App. at A-15 – A-16.

District 3 in the alternative redistricting plan created and advocated by Councilmember Giardina was smaller than the challenged District 3 and did not include Grand Isle, in the Gulf of Mexico, and portions of Lafitte, halfway between the Gulf and the River. The redistricting plan proposed by Councilmember Giardina also did not split the large subdivision of Woodmere, which he wanted to keep wholly in District 2 to his political advantage. This configuration, as the district court concluded after hearing the overwhelming testimony on political motivation, would have politically assisted Giardina.[9]

By Resolution No. 69122, passed on May 8, 1991, the Jefferson Parish Council adopted a modified redistricting plan, by a vote of 6-1.[10] Giardina was the only member of

---

9. The trial evidence disclosed that residents of Woodmere had strongly supported Giardina's candidacies in the past. Lawson wanted at least part of Woodmere excluded from any proposed District 2 because he wanted to improve his own re-election prospects at the expense of Giardina's. Lawson and his former aide, Kenneth Hughes, testified that a portion of the Woodmere residents were angry with Lawson concerning drainage problems; these Woodmere residents were removed from District 2 under Lawson's politically-infused plan, as the detailed factual findings issued by the district court corroborate.

10. After the publication of the Lawson Plan in the local newspaper, which included, at that time, Maplewood in District 3, (Cont'd)

the Council to vote against this plan. The modified redistricting plan retained the six-and-one councilmanic scheme, with six single-member councilmanic districts and one at-large seat. The plan also included a black majority councilmanic district, District 3, with a BVAP of 57.40%; those councilmanic lines politically favored Lawson.[11]

The district court rejected the modified redistricting plan, admonished the parties for letting "politics" enter the districting process, and appointed a special master to draw up a redistricting proposal for the Court. The special master submitted a "6-1" redistricting plan to the district court containing a black councilmanic district with a 49% BVAP. Subsequently, the Fifth Circuit approved the modified redistricting plan submitted by the Jefferson Parish Council to remedy the Section 2 violation, reversed the district court's judgment implementing the special master's plan, and remanded the case to the lower court. In its August 8, 1991

(Cont'd)

a portion of Maplewood was later moved from District 3 into District 1 in the final plan; the trial evidence was unrebutted that this change was an accommodation to Ida Saik, a political activist who complained loudly and publicly to Councilmembers Ward and Lawson about her exclusion from District 1. As the result of Saik's protestations, her home was placed in District 1 as a "last minute" adjustment to eliminate her broadcasted complaints and placate one of Councilmember Ward's constituents.

11. During the negotiation process in 1991, there were communications with the DOJ concerning how retrogression was analyzed in the context of Section 5. It was explained that retrogression was measured using the most current census data and the most recent precleared plan. Using that measurement, the DOJ suggested that the nonretrogression benchmark for the BVAP in District 3 in the new plan would be 52.3%.

ruling, the Fifth Circuit also stated that the special master's plan "must fall for failure to include the one district with a majority black voting age population."[12]

After the Fifth Circuit's mandate and the district court's ruling of August 13, 1991, the Jefferson Parish Council submitted a plan to the DOJ which reflects the following: a seven-member Council to be comprised of six single-member districts and one at-large district. The black majority councilmanic district included a BVAP of 57.40% under the 1990 Decennial Census. The DOJ precleared the plan. It is this redistricting plan, previously approved by the DOJ and ordered to be implemented by the *EJC* Court and the Fifth Circuit to address § 2 violations, that has been challenged by the Petitioners nearly a decade later.[13]

---

12. The circuit court expressly ruled that "the district court should promptly adopt and implement a plan that, while applying 1990 census data, otherwise remains as faithful as practicable to 'the' Plan, including a black voting age majority population in District No. 3."

13. In the 1991 first primary for Parish Council in the newly created District 3, Donald Jones, an African-American, received the most votes from African-American voters and Charles F. Lightfoot, a white person, received the most votes from non-African-American voters. Donald Jones was elected to the Jefferson Parish Council for District 3 in 1991. Jones' election as the Council representative for District 3 marked the first time in the twentieth century that an African-American was elected to the Jefferson Parish Council.

B. Course Of Proceedings And Disposition In Courts Below

The catalyst for this lawsuit arose on July 28, 1995, when a few residents of councilmanic District 3 in Jefferson Parish and the Maplewood Civic Association sought declaratory and injunctive relief against the Parish of Jefferson, *et al.*, that the current Jefferson Parish Council districting plan is an unconstitutional racial classification in violation of the Fourteenth Amendment to the United States Constitution. In this action, Petitioners attack the councilmanic districts authorized by the district court and the Fifth Circuit in the prior *EJC* litigation. A number of the Petitioners were dismissed due to lack of standing or because they did not want to pursue their allegations.

Trial in this action began on March 10, 1997. The parties presented nearly a week of testimony. On April 24, 1997, the district court rendered its Order and Reasons, entering judgment in favor of defendants, dismissing Petitioners' constitutional challenge as a matter of law. In its Order and Reasons, the district court found that "while [race] was a factor, it is clear that political incumbency drove the pencil in designing these districts." App. at A-48. On August 17, 1999, the Fifth Circuit entered judgment, affirming the lower court's opinion. The Fifth Circuit stated that "[l]ike the district court before us, we cannot find that race predominated. While relevant, issues pertaining to race were subordinated to concerns for political incumbency, joining communities of interest, satisfying one-person, one-vote requirements, and geographical realities." App. at A-29. On November 15, 1999, Petitioners filed their petition for writ of certiorari with this Court. On January 17, 2000, Petitioners refiled a completely redrafted petition for writ of certiorari with substantive changes.[14]

14. Petitioners received a letter dated November 17th from the Clerk of the United States Supreme Court in accordance with Supreme Court Rule 14.5 returning all copies of the petition for writ of certiorari for noncompliance of the Supreme Court rules. Petitioners were directed to file "corrected" briefs within 60 days.

SUMMARY OF ARGUMENTS FOR DENYING WRIT

On August 8, 1991, the United States Court of Appeals for the Fifth Circuit ordered, as a remedy for a previously adjudicated violation of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, the imposition of a redistricting plan for the Jefferson Parish Council, the governing body of Jefferson Parish, Louisiana, which would include one district having a BVAP majority. Four years later, Petitioners filed this separate action against the Council, arguing that the plan adopted in response to the Fifth Circuit's Order violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Although Petitioners do not claim that the underlying Order by the Fifth Circuit was unconstitutional, they do contend that the Council's decision to comply with that Order by creating District 3 with a BVAP of 57.40% was predominantly motivated by race. The district court found, to the contrary, that the Council's selection of this particular District 3, rather than some other BVAP majority district, was "driven primarily by politics," not race, App. at A-63, and the Fifth Circuit affirmed, finding no clear error. App. at A-21.

The only question properly before this Court is whether the Fifth Circuit erred in affirming the district court's factual findings in this constitutional case. As will be demonstrated hereafter, the first question purportedly presented by the Petition, concerning the proper application of § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, was not resolved by the district court or the Fifth Circuit and is not properly before this Court. The DOJ advised the Council that it would use the 1990 BVAP of 52.3% in the prior version of District 3 as a benchmark against which to measure retrogression under

§ 5. Contrary to Petitioners' arguments, Petn. 6-7, the courts below did not hold that the Council was required to recognize this benchmark, but only that it was "justified" in so doing, App. at A-24, A-58, so that the use of that benchmark did not suffice to prove discriminatory intent. The third issue purportedly raised by the petition, whether the boundaries of the new District 3 are supported by a compelling state interest, was not reached by the Fifth Circuit. App. at A-22, A-23. In fact, the Fifth Circuit declined to address the issue, since Petitioners had failed to demonstrate that race predominated, a prerequisite for strict scrutiny analysis. App. at A-23. In the unlikely event that this Court should reverse the factual finding of the courts below that the Parish Council was not predominantly motivated by race in drawing District 3, this Court's customary course of action would be to remand to the Fifth Circuit for application of strict scrutiny in the first instance. *California Dental Ass'n v. F.T.C.*, 526 U.S. 756, 119 S. Ct. 1604, 1618 (1999); *United States v. O'Hagan*, 521 U.S. 642, 678, 117 S. Ct. 2199, 2220 (1997).

The inescapable and uncontroverted factual foundation of this case is the Fifth Circuit's Order in the *EJC* litigation to create a district with a BVAP majority to remedy a Section 2 violation. While the Fifth Circuit correctly noted in this case that "much of [petitioners'] argument appears designed collaterally to attack the lower court's previous findings of a Section 2 violation," App. at A-22 n.23, Petitioners never deigned to ask the district court or the Fifth Circuit to invalidate that order, and they do not challenge it in their petition to this Court. Having accepted, then, that the Council was obliged to create a BVAP majority district to remedy a Section 2 violation, Petitioners faced a steep challenge in proving that the boundaries of the District 3 as actually created, using a BVAP of 57.40%, were determined

predominantly by race, rather than by more traditional political considerations. Applying settled law to the evidence, both courts below appropriately determined that Petitioners had failed to carry their burden and the lower courts likewise rejected Petitioners' perception of the witnesses' testimony. Contrary to Petitioners' representations, the lower courts established no new principles of law which require this Court's attention. The courts below fully considered and correctly decided this constitutional case and this Court certainly need not review the evidence, including the trial testimony, a third time.

The decision below turns on its unique facts. This Court's resources are best devoted to cases which present compelling reasons for review; the instant matter is not such a case.

ARGUMENT

A. Petitioners' Complaint Is Simply That The Lower Courts Did Not Believe Their Proffered Evidence. There Is No New Substantive Holding As A Result Of The Decision Below, Nor Is There A Conflict Among The Circuits That Warrants Review By This Court.

This case was and remains a constitutional challenge brought by Petitioners under the Fourteenth Amendment. The evidentiary linchpin in such cases is whether there has been intentional racial discrimination. In this case, the decisions below turn upon their own unique facts. Both the trial court and the appeals court appropriately determined that the Parish of Jefferson was not predominantly motivated by race in

drawing District 3. To the extent that District 3 embodies irregular features, politics and other nonracial factors were the driving force.

In *Miller v. Johnson*, 515 U.S. 900, 915, 115 S. Ct. 2475, 2488 (1995), this Court observed that a district court's review of a challenge to a state's redistricting plan should begin with the presumption that the state has acted in good faith compliance with constitutional standards. In *Bush v. Vera*, 517 U.S. 952, 955, 116 S. Ct. 1941, 1950 (1996) (plurality opinion), this Court stated that it is not enough for a claimant to show that race was one of several factors animating the drawing of a district's boundaries to overcome the presumption of good faith and to trigger strict scrutiny; rather, for strict scrutiny to apply, a claimant must prove that race was the predominant factor motivating the state's redistricting decision. *Miller*, 515 U.S. at 915, 115 S. Ct. at 2488. In order to meet that burden, a person making a constitutional challenge of the state's plan must prove that the state "subordinated traditional districting principles to race." *Miller*, 515 U.S. at 919, 115 S. Ct. at 2490.

Applying those well-settled principles, the district court in this case found that Petitioners failed to show that race predominated in the configuration of District 3. That factual finding is entitled to deference on appeal and may be reversed only if it is clearly erroneous. *Miller*, 515 U.S. at 915, 115 S. Ct. at 2488. The clear error standard of review has been applied by this Court in other constitutional voting rights cases as well. *See Rogers v. Lodge*, 458 U.S. 613, 622-627, 102 S. Ct. 3272, 3278-3281 (1982). Moreover, this Court has emphasized the special familiarity of district courts with the community where the district courts are situated, including traditional districting principles used in the

jurisdiction and the intrinsically local geographic factors. *White v. Regester*, 412 U.S. 755, 769-770, 93 S. Ct. 2332, 2341 (1973). In seeking to overturn the district court's factual findings that they have failed to prove race predominated in the drawing of District 3, Petitioners in essence are asking this Court to make its own independent assessment of the evidence with respect to compactness, shape, contiguity, relationship to political subdivisions and communities of interest, and to reach different conclusions from those reached by the district court and the appeals court. Equally as significant, Petitioners' application rests upon their desire for this Court to reject the chronicled credibility choices of the district court and for this Court to make contrary credibility choices. Revealing the precariousness of their position, Petitioners ask this Court to accept their factual views and substitute these views for the lower courts' assessment of credibility based upon Petitioners' cross-examination of several witnesses during trial; however, the relevant inquiry is whether the district court's factual findings (including credibility choices and recognition of bias), affirmed by the appeals court, are clearly erroneous. They are not.

In seeking to reverse the lower courts' findings that District 3 is constitutionally sound, Petitioners rely on this Court's decisions in *Miller, Vera* and *Shaw v. Hunt*, 517 U.S. 899, 116 S. Ct. 1894 (1996); however, Petitioners' reliance on these cases is misplaced. In *Miller, Shaw*, and *Vera*, the district courts had determined that race had in fact played a sufficient role in the design of the districts to warrant strict scrutiny analysis. *Miller*, 515 U.S. at 907, 115 S. Ct. at 2484; *Shaw*, 517 U.S. at 904, 116 S. Ct. at 1900; *Vera*, 517 U.S. at 957, 116 S. Ct. at 1951. In contrast, in this case, both the district court and the appeals court found that race was not

the predominant motive in the district's design. Since the district court's factual findings on the issue of predominant motive are reviewed under the clearly erroneous standard, this critical distinction is significant both legally and factually.

After three long days of trial in this proceeding at which time 22 witnesses testified and 55 exhibits were introduced, Petitioners failed to prove that any circumstances had changed in Jefferson Parish through March of 1997, regarding the prior factual findings in the *EJC* litigation of racially polarized voting;[15] the geographic compactness and political cohesion of African-Americans; the existence of vestiges of discrimination in the Parish of Jefferson;[16] and the communities of interest among African-Americans within District 3.[17]

The testimonial evidence at trial proved that the redistricting process was first and foremost predominantly political and driven by incumbency concerns, such as

---

15. Dr. Richard Engstrom testified as an expert witness on voter analyses. His testimony, which was uncontroverted by Petitioners, confirmed that there remains a pattern of racially polarized voting in Jefferson Parish, since the conclusion of the *EJC* litigation.

16. Dr. Raphael Cassimere, Jr. testified as an expert historian. His testimony, which was uncontroverted by Petitioners, indicated that vestiges of racial discrimination in the Parish of Jefferson persist today.

17. Dr. Lawrence Powell testified as an expert historian. His testimony, which was uncontroverted by Petitioners, explained the political cohesion and the communities of interest among African-Americans in District 3.

District 3's "V-shape."[18] The current District 3's departure from the shape of District 3 in the East Jefferson Coalition's alternative plan was the result of non-racial redistricting criteria, mainly, incumbency protection and the need for contiguity, as well as an even distribution of the population.[19] As the Fifth Circuit correctly observed, "[t]he record reveals no clear error inasmuch as incumbency protection, maintaining community of interest, addressing one person, one vote concerns and natural geographic conditions predominated in drawing District 3." App. at A-12.

---

18. As detailed earlier, the appeals court observed that the district court had determined that past redistricting tradition in Jefferson Parish had not strictly adhered to geometric standards of compactness. App. at A-20. The appeals court also noted that the lower court had determined that the "very irregular" geography and topography of the Parish (including the fact that it is 50% water) substantially limits the ability of the Parish to adhere to such standards. In light of these findings, the district court rejected Petitioners' assertion that the district was bizarre on its face and the appeals court agreed. App. at A-20 – A-21.

19. Grand Isle and lower Lafitte had been in District 2. Lawson considered these areas to be pro-Giardina, so he admitted he moved these areas into District 3. This area was in the southern portion of the Parish and is divided from the unincorporated municipality of Jean Lafitte by canals and the Intracoastal Waterway. Thus, Lawson carved a "V" into that area, preserving as much of the Lafitte area as possible in District 2. He jettisoned the rest into District 3; hence, Grand Isle and Barataria became part of District 3. Lawson, a Democrat, and Giardina, a Republican, two political rivals, both testified that these districts were created to help Lawson get re-elected. App. at A-15 – A-16. Lawson was re-elected in an acrimonious contest against Giardina.

The evidence supports the lower courts' factual findings that race did not predominate in the drawing of District 3 and these factual findings cannot be undercut by Petitioners' attempt to demand race-neutral explanations for each boundary of District 3. Under Petitioners' approach, strict scrutiny would be mandated for any consideration of race. The Fifth Circuit astutely made this observation in the course of its own opinion when it noted that Petitioners "implicitly argue that *any* consideration of race, even where such consideration is de minimus, mandates a finding that race predominates. This implication or argument has been squarely rejected by *Miller, Vera, Abrams* and the *EJC* litigation; therefore, we cannot agree." App. at A-22. In rejecting Petitioners' challenge, both the district court and the appeals court accurately concluded that, while issues of race were certainly relevant inasmuch as the Parish Council was directed to remedy a Section 2 violation, race did not predominate. App. at A-22. Respondents submit that the lower courts were correct in concluding that the evidence shows that the Parish was pursuing a mix of wholly legitimate interests without race predominating in drawing District 3. While Petitioners seek to have this Court make its own independent assessment of the evidence and witnesses' demeanor, the relevant inquiry was and remains whether the lower courts' findings are clearly erroneous and Respondents submit that they are not.

Both the district court and the Fifth Circuit applied well-established Fourteenth Amendment decisional law to the peculiar facts of this case. The courts below fully considered and correctly decided the issues. Contrary to Petitioners' representations, the findings of the lower courts are not clearly erroneous, and, in light of the facts peculiar to this case, this decision in no way establishes any new principles of law that will have any application in any other case.

B. Petitioners Have Sought Review On The Issue Of Whether The Boundaries Of The New District 3 Were Supported By A Compelling State Interest. That Issue Was Not Reached By The Fifth Circuit.

One of the issues argued by Petitioners is whether the boundaries of the new District 3 were supported by a compelling state interest. *See* App. at A-22, A-23. The Fifth Circuit properly declined to address this issue.

Under this Court's precedents, it is well-settled that there is no equal protection violation and, indeed, no strict scrutiny analysis merely because race is a factor in the shaping of an electoral district. *See Bush v. Vera*, 517 U.S. at 958, 116 S. Ct. at 1951 ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race.") Moreover, strict scrutiny does not, as Petitioners suggest, apply to every instance involving the intentional creation of majority-minority districts. *See DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994) (strict scrutiny did not apply to an intentionally created compact majority-minority district), *summarily aff'd*, 115 S. Ct. 2637 (1995). To trigger strict scrutiny it was incumbent upon Petitioners to demonstrate under *Miller* and *Vera*, that race played a predominant role, subordinating all other neutral redistricting principles in the design of the challenged districts.

In this constitutional challenge, the Fifth Circuit concluded that the resolution of this case turned on the discrete issue of whether race predominated in the redistricting plan. *See* App. at A-29. After a thorough analysis, the Fifth Circuit decided, as had the lower court, that Petitioners had failed to prove that race predominated — a prerequisite for strict scrutiny analysis. App. at A-23.

In its opinion, the Fifth Circuit further observed that while the lower court had addressed strict scrutiny in an abundance of caution, it declined to do so. App. at A-23.

If this Court decides to disturb factual findings of the courts below that the Parish Council was not predominantly motivated by race in drawing District 3, this Court's customary course of action would be to remand to the Fifth Circuit for application of strict scrutiny in the first instance.[20] While Respondents maintain that the lower courts below fully considered and correctly decided the issue that strict scrutiny did not apply, if this Court decides to reverse those factual findings, Respondents submit that this Court should remand to the Fifth Circuit for application of strict scrutiny, which would lead to the same judgment of dismissal.

---

20. In *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816 (1993), the district court dismissed as a matter of law a claim of racial gerrymandering in the formation of a majority-black legislative district. Though this Court reversed, it remanded the case to the district court for application of the articulated standards. 509 U.S. at 658, 113 S. Ct. at 2832. *See also Gilbert v. Homar*, 520 U.S. 924, 935-36, 117 S. Ct. 1807, 1814 (1997) ["Because neither the Court of Appeals nor the District Court addressed whether . . . petitioners violated due process . . . we will not consider this issue in the first instance, but remand for consideration by the Court of Appeals."]

C. Petitioners Have Sought To Refashion The Issues They Presented To The Lower Courts And Which Were Adjudicated By The Lower Courts By Contending That The Issue Of Retrogression Was A Linchpin In This Case; It Was Not. The Lower Courts Did Not Hold That The Parish Of Jefferson Was Required To Meet A Benchmark And It Is Inappropriate For Petitioners To Seek To Sidestep The Lower Courts' Factual Findings Through Certiorari Review.

Petitioners are seeking to have this Court review the proper application of § 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Petitioners seek review of this issue notwithstanding the fact that this issue was neither resolved by the Fifth Circuit nor the district court and is, therefore, not properly before this Court.

Respondents acknowledge that Jefferson Parish is covered by § 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Under § 5, the Parish, as a covered jurisdiction, may not "enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964" unless it secures preclearance. 42 U.S.C. § 1973c. Preclearance is achieved in one of two ways: filing a declaratory judgment action in the United States District Court for the District of Columbia or, submitting the change to the United States Attorney General. *See* App. at A-23. In *Beer v. United States*, 425 U.S. 130, 141, 96 S. Ct. 1357, 1364 (1976), this Court determined that a voting change may not be precleared if it "would lead to a retrogression in the position of racial minorities with respect to the effective exercise of the electoral franchise."

In *Beer*, this Court observed that "the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." 425 U.S. at 141, 96 S. Ct. at 1363. *See also Reno v. Bossier Parish School Board*, 120 S. Ct. 866, 871-872 (2000). As a general rule, the determination of retrogression requires a comparison between the proposed voting change and the last legally enforceable practice or procedure used by the jurisdiction. *See* 28 C.F.R. § 51.54(b)(1) (1999); *Abrams v. Johnson*, 521 U.S. 74, 97-98, 117 S. Ct. 1925, 1939 (1997) (proper benchmarks are the plans that are in effect). The latter standard is usually referred to as a benchmark. App. at A-24.

In this constitutional challenge, the district court made detailed factual findings that Jefferson Parish was *justified* in using 52.3% BVAP as the appropriate benchmark for determining retrogression under § 5. App. at A-24. The Fifth Circuit observed on appeal that while the Lawson Plan slightly exceeded the benchmark, the Fifth Circuit stated that it was political incumbency and other political concerns that were the driving forces. App. at A-26.

The DOJ advised the Council that it would use the 1990 BVAP of 52.3% in the prior version of District 3 as a benchmark against which to measure retrogression under § 5. Contrary to Petitioners' arguments, Petn. 6-7, the courts below did not opine that the Council was required to recognize this benchmark, but only that it was justified in doing so, App. at A-24, A-58; consequently, use of that benchmark did not suffice to prove discriminatory intent. Since this is a constitutional case, the decision by the Parish to meet that benchmark is certainly not probative of

intentional racial discrimination. Moreover, the lower courts did not opine whether the Parish violated § 5 and equally significant, the lower courts did not need to reach this issue in view of the factual recitations behind the political creation of the councilmanic districts. Indeed, a local court has no jurisdiction to determine whether a practice satisfies § 5; the "inquiry of a local district court in a § 5 action against a State or political subdivision is 'limited to the determination of whether "a [voting] requirement is covered by § 5. . . ." ' " *United States v. Board of Supervisors of Warren Co., Mississippi*, 429 U.S. 642, 645-46, 97 S. Ct. 833, 835 (1977) (citations omitted). Succinctly stated, the § 5 issue alternatively argued by Petitioners is nothing more than one facet of the controlling issue of whether there was discriminatory intent; it does not, as Petitioners assert, set a legal benchmark for the Fifth Circuit, nor any other circuit court. Concomitantly, the lower courts held that there was no discriminatory intent.

Regardless of how Petitioners try to frame their issues, this case is not a § 5 case; the issue adjudicated was whether race predominated in the drawing of District 3. It did not. Respondents submit that the lower courts properly determined that race *did not* predominate; hence, contrary to Petitioners' far-stretched argument, the issue of the proper benchmark for retrogression under § 5 is not central to the lower courts' opinions as those courts correctly recognized.

CONCLUSION

This is not a case worthy of the Court's limited judicial resources. The decisions below turn in large measure upon specific factual findings and credibility choices. The lower courts' decisions correctly analyzed and adjudicated the issues. Petitioners have not demonstrated any need for this Court to revisit their "sufficiency of the evidence" claims, regardless of the terms in which these arguments are now couched. For the factual and legal reasons set forth above, review by this Court is neither necessary nor appropriate and the Writ of Certiorari should not issue.

Respectfully submitted,

HARRY ROSENBERG
Counsel of Record
M. NAN ALESSANDRA
PHELPS DUNBAR, L.L.P.
400 Poydras Street, 30th Floor
New Orleans, LA 70130-3245
(504) 566-1311

ROY J. RODNEY, JR.
KIM M. BOYLE
RODNEY, BORDENAVE, BOYKIN,
BENNETTE & BOYLE
400 Poydras Street, 24th Floor
New Orleans, LA 70130
(504) 527-5450

Counsel for the Parish of Jefferson, State of Louisiana, Respondents

Supreme Court, U.S.
FILED
APR 17 2000
CLERK

(5)

No. 99-1203

In the Supreme Court of the United States

DENNIS THERIOT, ET AL., PETITIONERS

v.

PARISH OF JEFFERSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

BILL LANN LEE
Acting Assistant Attorney General

MARK L. GROSS
REBECCA K. TROTH
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

25pp

QUESTIONS PRESENTED

1. Whether the court of appeals correctly upheld as not clearly erroneous the district court's finding that incumbency and other nonracial considerations, rather than race, predominated in the drawing of District 3 of the Parish Council of Jefferson Parish, Louisiana, and therefore correctly concluded that District 3 is not subject to strict scrutiny.

2. Whether the court of appeals correctly held that the appropriate benchmark for determining whether a proposed redistricting in Jefferson Parish would satisfy the nonretrogression principle of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, was the most recent redistricting plan that the Parish had adopted and the Attorney General had precleared under Section 5, including the current black percentage of the voting age population of the Parish districts in that plan.

3. Whether the configuration of District 3 is narrowly tailored to meet the compelling state interest of compliance with the Voting Rights Act.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	21

TABLE OF AUTHORITIES

Cases:

Abrams v. *Johnson*, 521 U.S. 74 (1997)	16
Beer v. *United States*, 425 U.S. 130 (1976)	17
Burton v. *Sheheen*, 793 F. Supp. 1329 (D.S.C. 1992), vacated on other grounds, 508 U.S. 968 (1993)	15-16
Bush v. *Vera*, 517 U.S. 952 (1996)	10-11, 18
City of Rome v. *United States*, 446 U.S. 156 (1980)	15
Goodman v. *Lukens Steel Co.*, 482 U.S. 656 (1987)	12
Hunt v. *Cromartie*, 526 U.S. 541 (1999)	11
Ketchum v. *Byrne*, 740 F.2d 1398 (7th Cir. 1984), cert. denied, 471 U.S. 1135 (1985)	15
Miller v. *Johnson*, 515 U.S. 900 (1995)	10, 13
Perkins v. *Matthews*, 400 U.S. 379 (1971)	17
Reno v. *Bossier Parish Sch. Bd.*:	
520 U.S. 471 (1997)	17
120 S. Ct. 866 (2000)	3
Shaw v. *Hunt*, 517 U.S. 899 (1996)	10
Shaw v. *Reno*, 509 U.S. 630 (1993)	18, 19, 20
Thornburg v. *Gingles*, 478 U.S. 30 (1986)	19
Young v. *Fordice*, 520 U.S. 273 (1997)	16

Constitution, statutes and regulations:

U.S. Const.:	
Amend. XIV (Equal Protection Clause)	2, 5, 9, 20
Amend. XV	2, 5

Statutes and regulations—Continued: Page

Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.*:
§ 2, 42 U.S.C. 1973 ..... *passim*
§ 5, 42 U.S.C. 1973c ..... *passim*
28 C.F.R.:
Section 51.54(b)(1) 3, 15
Section 51.54(b)(2) 15
Section 51.55 20

In the Supreme Court of the United States

No. 99-1203

DENNIS THERIOT, ET AL., PETITIONERS

v.

PARISH OF JEFFERSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A29) is reported at 185 F.3d 477. The opinion of the district court (Pet. App. A37-A69) is reported at 966 F. Supp. 1435.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1999. The petition for a writ of certiorari was filed on November 15, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Parish of Jefferson is a political subdivision of the State of Louisiana and is governed by a Parish President and a seven-member Council. In 1980, the Parish had a population of 454,592. At that time, blacks in the Parish made up 13.86% of the total population and 11.78% of the voting age population (VAP). Pet. App. A2 & n.1.

Before 1987, members of the Council were elected under what was known as the "4-2-1 plan." Under that plan, the Parish was divided into four Council districts, each of which elected one member. In addition, a floterial district, or super-district, comprising Districts 1 and 2, elected a fifth member, a floterial district comprising Districts 3 and 4 elected a sixth member, and a seventh member (the Council Chairman) was elected from the entire Parish at-large. In 1986, several Parish voters brought suit against the Parish, alleging that the Council districts were malapportioned in violation of the one-person, one-vote requirement of the Equal Protection Clause. The plaintiffs prevailed in that suit, and in 1987 the district court entered a consent decree that redrew the four base councilmanic districts, but otherwise maintained the 4-2-1 structure of the Council. No district in the 1987 consent decree plan had a black population exceeding 24%. Pet. App. A2-A3 & n.1.

2. Two Jefferson Parish civic associations and six black voters brought suit alleging that the 4-2-1 plan violated Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, and the Fourteenth and Fifteenth Amendments to the Constitution. After a bench trial, the district court ruled in 1988 that the Parish's districting plan violated Section 2. See Pet. App. A3-A4. The district court approved, as a remedy for the Section 2

violation, a plan proposed by the Parish in March 1990,[1] which abandoned the 4-2-1 structure and instead established one at-large district and six single-member districts, one of which, District 3, had a black majority population and voting age population. The Attorney General precleared the March 1990 plan under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c.[2] Pet. App. A4-A5; Pet. 2 (stating that District 3 had 50.12% black VAP as reflected in 1980 census figures).

The Parish appealed the district court's finding of liability under Section 2. The court of appeals affirmed, and remanded the case for implementation of the new districting plan. Pet. App. A5.

3. On remand, the district court recognized that the March 1990 plan would have to be adjusted to accommodate population shifts reflected in the newly

---

[1] In reciting the history of this case, the court of appeals initially referred to this plan incorrectly as the February 1990 plan, Pet. App. A4-A5, but later correctly referred to it as the March 1990 plan (*id.* at A25 n.24). See *id.* at A45-A46 (district court's findings of fact).

[2] Because Louisiana and all of its political subdivisions are jurisdictions covered under Section 5 of the Voting Rights Act, Jefferson Parish may not enact or seek to administer any new voting procedure unless it first obtains "preclearance" of the new procedure from either the United States District Court for the District of Columbia or the Attorney General. A voting change may not be precleared if it will cause, or has the purpose to cause, a "retrogression" in minority voting strength, that is, if the change will adversely affect, or is designed to affect adversely, the ability of minority voters to participate in the political process. See *Reno* v. *Bossier Parish Sch. Bd.*, 120 S. Ct. 866, 868-869 (2000). That retrogression standard generally requires a comparison of the proposed voting change to a "benchmark," which is "the last legally enforceable practice or procedure used by the jurisdiction." 28 C.F.R. 51.54(b)(1).

released 1990 census figures. According to the 1990 census, the total population of the Parish had declined by about 1.4%, to 448,306, of which 74% was white and 17.5% (78,263) was black. Pet. App. A5 n.8. The black percentage of the total population of the Parish grew by 3.6 percentage points between the 1980 census and the 1990 census. *Ibid.* The Department of Justice informed Jefferson Parish that the March 1990 districting plan was the appropriate benchmark for determining whether a new districting plan would cause retrogression under Section 5 of the Voting Rights Act. The 1990 census showed that District 3 in the March 1990 plan had a 52.3% black VAP. *Ibid.*

Councilman James Lawson, the incumbent in District 2 in the invalidated 4-2-1 plan, proposed a new plan using the new census figures that protected his incumbency interests as well as the interests of the majority of the other incumbents. On May 8, 1991, the Parish Council adopted the plan Lawson had proposed, altered slightly to reflect the concerns of an extremely vocal constituent.[3] In the Lawson Plan, District 3 has a black VAP of 57.4%. Pet. App. A6-A7.

Although the parties presented the Lawson Plan to the district court as a joint stipulation, the district court rejected it on the ground that the parties had improperly allowed "politics" to influence the redistricting process. The district court appointed a special master to assist in adjusting the March 1990 plan to reflect the census figures. The special master drew a plan based largely on the lines in the March 1990 plan, which con-

---

[3] See Pet. App. A53 (district court refers to that constituent as raising "political Cain" because she wanted to be in District 1); *id.* at A58 (that "uproar" caused the Council to divide precinct between two districts).

tained a District 3 with a 49% black VAP. The district court ordered implementation of the special master's plan. Pet. App. A7.

4. The court of appeals reversed the district court's rejection of the Lawson Plan. The court of appeals ruled that the district court had intruded on the Council's legislative responsibility in redistricting by ordering implementation of the special master's plan, and that the special master's plan unacceptably failed to include a black-majority district necessary to remedy the Parish's violation of Section 2. The remand order instructed the trial court to issue an injunction requiring the Parish to submit the Lawson Plan to the Department of Justice for expedited review under Section 5. The district court did so, and on August 27, 1991, the Attorney General precleared the Lawson Plan. Pet. App. A7-A8.[4]

5. In 1995, petitioners brought this suit in district court, challenging the Lawson Plan (particularly District 3) as an unconstitutional racial gerrymander in violation of the Fourteenth and Fifteenth Amendments to the Constitution and the Voting Rights Act of 1965. The district court allowed the United States and local officials to intervene to defend the Lawson Plan. Pet. App. A8-A9.

After a bench trial, the district court entered judgment for respondents. Pet. App. A36-A68. The court's extensive findings of fact stressed that incumbency played the predominant role in the Council's decision to adopt the Lawson Plan. In particular, the district court found that, while race "was a factor, it is clear that

---

[4] Elections were held in the fall of 1991 using the Lawson Plan, and for the first time in the history of Jefferson Parish, voters elected a black Council member. Pet. App. A8 & n.1.

political incumbency drove the pencil in designing these districts." *Id.* at A48.[5] Other factors at work, the court found, were the one-person, one-vote rule, considerations of contiguity and compactness in light of the Parish's particularly dispersed population, and other traditional districting principles, including uniting communities of interest. *Ibid.*; see *id.* at A53-A57. The district court also found that splitting districts and even precincts for political reasons was not uncommon in the Parish (*id.* at A55), that the increase in the black VAP of District 3 to 52.3% as reflected in the 1990 census justified the use of that figure for the purpose of measuring retrogression under Section 5 of the Voting Rights Act (*id.* at A58-A59), and that vestiges of discrimination remain in Jefferson Parish (*id.* at A59-A60).

After reiterating the factors that had predominated in determining the shape of the districts in the Lawson Plan, the district court held that District 3 should not be subjected to strict scrutiny because petitioners had failed to prove that race predominated in the drawing of that District. Pet. App. A62. The court further concluded that the shapes of the districts in the Lawson

---

[5] With respect to incumbency, the district court observed that the Council had understood that the first elections after the 1990 census would almost certainly pit incumbents against each other, as the Parish had abandoned the floterial districts in the old 4-2-1 plan. Recognizing that necessity, Lawson set out to ensure that his own district, District 2, included his strongest political constituencies, while likely supporters of his anticipated opponent for District 2, Lloyd Giardina, were placed in the neighboring District 3. For that reason, several areas were placed in District 3 even though those areas, if placed in District 2, would have made District 2 more compact. Some of those divisions, moreover, could not be explained on racial grounds, for several areas with larger black populations were placed in District 2 rather than the majority-black District 3. See Pet. App. A49-A51.

Plan were not so "bizarre" as to require strict scrutiny on the ground that the district lines could not be explained on a ground other than race. *Id.* at A63. Although the court therefore did not examine in detail whether District 3 satisfies strict scrutiny, it did state generally that "this plan has been narrowly tailored to meet a compelling state interest." *Id.* at A68.

6. The court of appeals affirmed. Pet. App. A1-A29. Noting that petitioners "bear the burden of proving an impermissible racial classification," *id.* at A11, it sustained the district court's finding that racial considerations did not predominate in the drawing of District 3: "The record reveals no clear error inasmuch as incumbency protection, maintaining communities of interest, addressing one-person, one-vote concerns and natural geographic conditions predominated in drawing District 3." *Id.* at A12.

The court stressed that much of the discussion surrounding the adoption of the Lawson Plan turned on political considerations, including the likelihood that Lawson and another incumbent (Lloyd Giardina) would each campaign for the same District 2 Council seat. "Although the Lawson Plan resulted in a race between Lawson and Giardina in District 2, it garnered the most support because it met the political and incumbency concerns of the majority of the existing councilpersons." Pet. App. A13.[6] The court of appeals also held that the

---

[6] The court rejected petitioners' contention that the Department of Justice had pressured the Parish "to adopt a plan with maximum benefits to minority voters." Pet. App. A17 n.18; *id.* at A25 n.24. The court concluded that, notwithstanding petitioners' efforts to "exaggerate and misconstrue the nature of the communications between the DOJ and the Parish Council," *id.* at A25, "there was no proverbial big brother manipulating the process of drawing the districts," *id.* at A17 n.18. Rather, "DOJ properly

district court did not clearly err in finding that District 3 unites communities of interest among low-income residents, and in particular, it sustained the district court's finding that District 3's low-income residents share "common social and economic needs." *Id.* at A18.[7] It further sustained the district court's finding of the "paramount" importance to the Parish of meeting the Constitution's one-person, one-vote requirement in a V-shaped jurisdiction that is "very irregular" geographically and topographically. *Id.* at A19-A20. The court did not find the shape of District 3 to be "bizarre on its face," but in any event, it determined that "any irregularity associated with the shape of District 3 is derivative of politics, joining communities of interest, one-person, one-vote concerns, and the geography and population distribution in the Parish." *Id.* at A20-A21.

Because the court of appeals determined that race did not predominate in the drawing of District 3, it concluded that strict scrutiny was not appropriate, and it did not address whether the Lawson Plan would survive strict scrutiny. Pet. App. A32. The court did,

---

advised the Parish of a benchmark under Section 5 of the Voting Rights Act." *Ibid.*

[7] In reaching that conclusion, the court of appeals cited the evidence in the record of the "plethora" of civic and community organizations whose members live in District 3 and have been active in addressing the issues of housing, education, and poverty in the community. Pet. App. A18 n.20. It also rejected petitioners' argument that that evidence of communities of interest was not properly considered by the district court because that evidence had been developed after the district lines were drawn. The court noted that, when the Lawson Plan was drawn in 1991, members of the Parish Council were already "well aware" of the socioeconomic conditions of Parish residents and were familiar with the evidence of those conditions compiled during the earlier Section 2 litigation. *Id.* at A19.

however, consider and reject petitioners' argument that the Lawson Plan could not be justified to avoid retrogression under Section 5 of the Voting Rights Act because (petitioners argued) only the last plan under which elections actually have been held provides the proper benchmark for determining retrogression. Pet. App. A24-A25. Rather, the court held, the appropriate benchmark for determining retrogression is the last plan that was legally in force or effect, not the last plan under which elections were actually held. A contrary rule, the court observed, would often "sentence minorities complaining of vote-dilution to a fate similar to Sisyphus," since a plaintiff that proved a Section 2 violation could not then use a plan entered as a remedy for that violation as the appropriate benchmark for Section 5 purposes (unless elections had actually been held under the remedial plan). See *id.* at A25-A26. In effect, the court observed, petitioners "would have us turn the [plaintiffs] away and have them prove a Section 2 violation all over again. We decline to impose such a requirement." *Id.* at A26.

ARGUMENT

The court of appeals correctly sustained the district court's finding that race did not predominate in the drawing of the lines of District 3 of the Jefferson Parish Council. That determination reflects a factbound application of this Court's now settled principles setting forth the requirements for establishing a racial gerrymander in violation of the Equal Protection Clause. The court of appeals also correctly concluded that conditions under the March 1990 plan at the time redistricting to reflect the 1990 census was proposed (including the black voting age population of the Parish Council's districts as reflected in the 1990 census figures)

provided the appropriate benchmark for determining whether a redistricting plan to account for 1990 census would cause retrogression in violation of Section 5 of the Voting Rights Act. That conclusion does not conflict with any decision of this Court or any court of appeals. Further, since the court of appeals concluded that race did not predominate in the drawing of District 3 in the Lawson Plan, it did not reach the question whether District 3 satisfies strict scrutiny. Accordingly, this case does not present an appropriate vehicle for review of any broad questions concerning whether and when compliance with the Voting Rights Act justifies a districting plan dictated primarily by racial considerations.

1. Petitioners contend that District 3, a black-majority district in Jefferson Parish, is an unconstitutional racial gerrymander. To establish a racial gerrymander, petitioners must first prove that race was the "predominant factor" motivating the jurisdiction's redistricting decision; that is, that the jurisdiction "subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Miller* v. *Johnson*, 515 U.S. 900, 916 (1995); see also *Shaw* v. *Hunt*, 517 U.S. 899, 905 (1996) ("The constitutional wrong occurs when race becomes the dominant and controlling consideration.") (internal quotation marks omitted). Because this "threshold standard" is a "demanding one," see *Miller*, 515 U.S. at 928 (O'Connor, J., concurring), strict scrutiny is not triggered by evidence that race was only one of several factors animating the drawing of a district's boundaries. See *Bush* v. *Vera*, 517 U.S. 952, 958-959 (1996) (opinion of O'Connor, J., joined by Rehnquist, C.J., and Kennedy,

J.) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. * * * Nor does it apply to all cases of intentional creation of majority-minority districts."); see also *id.* at 993 (separate opinion of O'Connor, J., concurring) ("Only if traditional criteria are neglected *and* that neglect is predominantly due to the misuse of race does strict scrutiny apply."); *Hunt* v. *Cromartie*, 526 U.S. 541, 546 (1999).

The courts below faithfully followed this Court's decisions and examined the factors considered by the Parish in drawing and adopting the Lawson Plan (including the lines of District 3). Based on that examination, the lower courts correctly concluded that incumbency, not race, was the predominant factor in the fashioning of District 3. With regard to the influence of incumbency concerns, the courts below found that Councilmember James Lawson was the driving force behind the plan that the Parish ultimately adopted and the court of appeals ordered into effect in August 1991. Pet. App. A6-A8. Because Lawson wanted his areas of political strength in District 2, areas were added and deleted for political reasons, and racial matters were secondary in the minds of those drawing the plan. *Id.* at A13-A14. Indeed, with regard to the specific geographical areas on which petitioners focus, the district court found either that there was no racial motivation present in placing those areas in District 3, or that political motivations predominated. *Id.* at A49-A54. The court of appeals agreed, concluding that "the issue of race was plainly subordinate to the majority of the councilpersons' preoccupation with protecting incumbency and maintaining other political advantages." *Id.* at A13-A14. The district court also exhaustively addressed the other factors that motivated the drawing

of the plan, and after reviewing that evidence in detail, the court of appeals confirmed that "[t]he record presents bountiful evidence supporting the district court's finding that political incumbency, communities of interest, one-person, one-vote, and geography dwarf issues pertaining to race." *Id.* at A21. Petitioners provide no basis for this Court to disturb those factual conclusions in which two lower courts have concurred. See *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 662 (1987).

Petitioners note that the Parish was aware of the need to comply with the Voting Rights Act in redistricting. It has never been disputed that the Parish considered as a factor in the 1991 redistricting process the need to create a majority-black district in order to comply with that statute. The Parish could not have acted otherwise in light of the adjudicated Section 2 violation. But evidence that the Parish undertook to comply with the Voting Rights Act is not proof that race *predominated* in the drawing of the specific lines of the majority-black district. Here, the courts below considered the evidence of the Parish's awareness of the need to devise a remedy for the Section 2 violation and to comply with Section 5 and concluded that neither those concerns nor other racial considerations predominated over traditional districting concerns, and indeed, that those considerations were accommodated within traditional districting principles. Thus, the court of appeals concluded that "[i]ssues of race were relevant, inasmuch as the Parish Council was directed to remedy a Section 2 violation, yet did not predominate." Pet. App. A22.

The courts below also agreed there was no evidence that District 3 reflected any policy of "maximization" of minority voting strength without regard to traditional

redistricting principles. Cf. *Miller* v. *Johnson*, 515 U.S. at 926. The district court found (Pet. App. A24) that petitioners "had not demonstrated that the [Department of Justice] coerced the Parish into designing a district that maximizes District 3's black population," and the court of appeals agreed: "Stated simply, there was no proverbial big brother manipulating the process of drawing the districts." *Id.* at A17 n.18. Because the plan the Parish drew generally respected traditional redistricting principles, and because (as the courts found) the relatively minor deviations from compactness in District 3 are explained by politics, not race, the fact that the Parish was also aware of the need to comply with the Voting Rights Act does not trigger strict scrutiny or suggest a constitutional violation.

2. Petitioners contend (Pet. 10-11) that the adoption of District 3 cannot be justified on the ground of avoiding retrogression of minority voting strength in violation of Section 5 because, they contend, the appropriate benchmark under Section 5 is minority voting strength in the last plan under which elections were actually held, not the last valid plan that was in force and effect. In this case, the last Council elections before the adoption of the Lawson Plan were held under the 4-2-1 plan, in which no district had more than a 24% black VAP. That plan, as we have explained (pp. 2-3, *supra*), was found to violate Section 2. The Parish subsequently adopted, and the Attorney General precleared, a March 1990 plan that created one black-majority district, but no elections were held under that plan because the census and the requirement of redistricting intervened.

Petitioners' argument is not properly presented in this case. At bottom, petitioner's contention amounts to an argument that District 3 of the Lawson Plan does

not satisfy strict scrutiny because, even if it was adopted to avoid retrogression, it is not narrowly tailored to accomplish that end since (they maintain) Section 5 precluded retrogression only from the 24% black VAP under the 4-2-1 plan, not the 52.3% black VAP in the March 1990 plan (as reflected in the 1990 census figures). But the question whether the Lawson Plan satisfies strict scrutiny would arise only if racial considerations had predominated in the adoption of that Plan. As we have explained, racial considerations did not so predominate, and so there is no occasion to reach the question whether the Lawson Plan is narrowly tailored to avoid a Section 5 violation. That question could arise only if the Lawson Plan required strict scrutiny.

In any event, petitioners' argument is without merit. Section 5 plainly bases nonretrogression on the most recent plan validly in force and effect, not on the earlier plan under which elections were most recently held. Otherwise, as the court of appeals observed (Pet. App. A25-A26), in many cases Section 2 litigation would be a pointless exercise. Here, for example, black voters in Jefferson Parish established in litigation that Jefferson Parish's 4-2-1 plan (with no majority-black district) violated Section 2, and that finding of liability was affirmed by the court of appeals. The parties then agreed upon, and the district court eventually adopted, a remedial (March 1990) plan in which one majority-black district was created. By the time that plan was finally adopted, however, the census had intervened, and so the Parish had to adopt a new plan to reflect population shifts. If petitioners' view of Section 5 were adopted, however, then Jefferson Parish could not have been justified even in adopting the very same remedial (March 1990) plan, because the proper benchmark for

retrogression would have been the previous 4-2-1 plan, with a maximum 24% black VAP in any district. Thus, to obtain a majority-black district after the 1990 census, the plaintiffs would have been required to establish a Section 2 violation over again (and perhaps again and again, if the vagaries of timing were such that elections were not held under a remedial plan before a new census). The Voting Rights Act does not relegate minority voters "to a fate similar to Sisyphus." *Id.* at A25-A26.

The Attorney General's Section 5 Guidelines explain that the retrogression standard generally requires a comparison of the proposed voting change to a "benchmark," which is "the last legally enforceable practice or procedure used by the jurisdiction," to determine whether there is any reduction in minority electoral opportunity. 28 C.F.R. 51.54(b)(1). Retrogression is determined by using the racial composition of the population in districts as reflected in the most recent census (or more accurate and recent figures) as a starting point. See *City of Rome* v. *United States*, 446 U.S. 156, 186 (1980) (the "effect of the 13 annexations must be examined from the perspective of the most current available population data"); 28 C.F.R. 51.54(b)(2). The use of the most recent census (or other highly reliable) figures is necessary because they are most likely to present an accurate depiction of minority voting strength at the time the Section 5 preclearance submission is made. If there have been population shifts in districts since the previous census, old census figures may present a misleading picture of minority voting strength. See *Ketchum* v. *Byrne*, 740 F.2d 1398, 1402, 1414 (7th Cir. 1984), cert. denied, 471 U.S. 1135 (1985); *Burton* v.

Sheheen, 793 F. Supp. 1329, 1347 (D.S.C. 1992), vacated on other grounds, 508 U.S. 968 (1993).[8]

Petitioners have sought to rely on *Young* v. *Fordice*, 520 U.S. 273 (1997), and *Abrams* v. *Johnson*, 521 U.S. 74 (1997), but those decisions confirm that the proper benchmark for retrogression is the current level of black voting strength in the last valid plan that was in effect in the jurisdiction. In *Abrams*, the Court rejected the contention that the proper benchmark for retrogression in that case was minority voting strength in a plan that was an unconstitutional racial gerrymander when it was drawn (as distinguished from a plan that became malapportioned over time because of population shifts), and held that the proper benchmark was the last plan that was constitutional when drawn and was legally in effect in the district before the unconstitutional plan was drawn. *Id.* at 97. That decision, however, establishes only that the plan that provides the benchmark must have been constitutional when it was drawn, not that elections must have been held under the plan. In *Fordice*, the Court rejected the claim that a provisional voter registration plan that was never actually adopted by the State was "in force or effect" for purposes of determining the benchmark. 520 U.S. at 282.

---

[8] To the extent that petitioners fault the practice of measuring minority voting strength using current census figures, it should be noted that petitioners' assumption (Pet. 4-5) that reliance on current figures will result in racial gerrymandering is unfounded factually as well as legally. There is no bias in that practice, as current census figures may show either increases or decreases in minority VAP from the previous census. If the 1990 census had shown that the minority VAP of District 3 had decreased over the previous decade, those 1990 census figures would still have provided the appropriate measure for determining retrogression.

In this case, it is not disputed that the March 1990 plan was valid and in effect when the 1990 census figures were released, and petitioners never challenged the constitutionality of that plan. The March 1990 plan was the plan the Council adopted, the district court approved, and the Attorney General precleared. It was the plan that would have been used had a Council election been held at that time to fill a vacancy or for any other reason. Cf. *Perkins* v. *Matthews*, 400 U.S. 379, 394-395 (1971). The court of appeals therefore correctly concluded that the March 1990 plan, including the 52.3% black VAP of existing District 3 under 1990 census data, provided the proper benchmark for Section 5 review of any plan that would be adopted after the 1990 census.[9]

---

[9] Petitioners note (Pet. 8) that, although District 3 in the March 1990 plan, with a black VAP of 50.12% as reflected in the 1980 census figures, satisfied the compactness requirement of a single-member majority-minority district established as a remedy for a Section 2 violation, no court has expressly decided whether a majority-minority district with a greater percentage of black voters than 50.12% also satisfies the compactness requirement under Section 2. Nevertheless, it remains true that the 52.3% black VAP in District 3 provided the appropriate figure for avoiding a violation of the nonretrogression principle of Section 5, which has a separate application from that of Section 2. This Court has frequently emphasized that Section 2 and Section 5 "combat different evils and * * * impose very different duties upon the States." *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 477 (1997). Section 2 "was designed as a means of eradicating voting practices that minimize or cancel out the voting strength and political effectiveness of minority groups." *Id.* at 479 (internal quotation marks omitted). Section 5, however, was designed "to insure that the gains thus far achieved in minority political participation shall not be destroyed," *Beer* v. *United States*, 425 U.S. 130, 141 (1976) (brackets omitted), and thus "freez[es] election procedures in the covered areas unless the changes can be shown to be" nonretro-

3. Petitioners argue more generally (Pet. 26-30) that the Lawson Plan does not satisfy strict scrutiny because that Plan was not necessary to avoid a violation of the Voting Rights Act. As we have explained (pp. 13-14, *supra*), that contention is not properly presented here, because both lower courts determined that race did not predominate in the drawing of District 3. In addition, the court of appeals did not address whether the Lawson Plan satisfies strict scrutiny, and so this Court should not decide that issue in the first instance. Cf. *Shaw* v. *Reno*, 509 U.S. 630, 658 (1993).

In any event, petitioners err in arguing that the court of appeals' August 1991 decision ordering the Parish to create a majority-minority district to remedy the adjudicated Section 2 violation did not establish a compelling interest in creating a majority-minority district when the Parish's district lines were adjusted to reflect the 1990 census. Although the Court has not explicitly decided the question, a majority of the Court has stated that compliance with Section 2 is a compelling state interest, see *Vera*, 517 U.S. at 990 (separate opinion of O'Connor, J., concurring); *id.* at 1033 (Stevens, J, dissenting); *id.* at 1065 (Souter, J., dissenting). Petitioners do not argue to the contrary here. See Pet. 26-30.

Rather, petitioners contend (Pet. 28) that compliance with Section 2 could not have been a compelling interest in this case because there was no evidence in this case that there "presently existed impediments to the Parish's minority citizens' ability to fully participate in the electoral process." In other words, petitioners argue that, when the Parish drew its majority-minority district in the Lawson Plan, the Parish was required *at*

---

gressive, *id.* at 140 (internal quotation marks and brackets omitted).

that time to establish that the absence of such a district would contravene Section 2. But petitioners fail to acknowledge that the court of appeals had *already* determined, only a year earlier, that the Parish's previous 4-2-1 election scheme violated Section 2, and had ordered the Parish to implement a plan with a majority-minority district as a remedy for that violation. Thus, petitioners appear to contend that the Parish and the courts below were required to reconsider those Section 2 findings after the 1990 census results became available and reconfirm that the preconditions for finding a Section 2 violation under *Thornburg* v. *Gingles*, 478 U.S. 30, 50 (1986), were met under new census data. Petitioners cite no authority (and there is none) for the proposition that a court must revisit a finding of a Section 2 violation whenever more recent census figures become available. The court of appeals properly rejected petitioners' invitation to revisit the merits of the protracted Section 2 litigation absent affirmative proof that population densities and concentrations had changed such that the *Gingles* preconditions could no longer be met. Pet. App. A26.

Petitioners also suggest (Pet. 9) that the Attorney General, in exercising her preclearance authority under Section 5, required the Parish to draw a district that is unconstitutional in order to avoid retrogression. That argument is flawed for several reasons. First, both the district court and the court of appeals specifically found (in addition to their findings that racial considerations did not predominate in the drawing of District 3) that the shape of the District 3 under the Lawson Plan was not "bizarre" (especially given the highly dispersed population of the Parish) and did not contravene *Shaw* v. *Reno*. See Pet. App. A20, A63. Therefore, this case presents no occasion for the Court to consider what

limits the Equal Protection Clause, including the principles of *Shaw* v. *Reno*, may place on the nonretrogression principle of Section 5.

Second, the Attorney General considers constitutional principles against racial gerrymandering in applying the nonretrogression principle of Section 5 in the administrative preclearance process. The Attorney General's Section 5 guidelines make clear that the Attorney General considers a variety of factors in determining whether preclearance should be granted, including the protections of the Equal Protection Clause:

> In making a determination the Attorney General will consider whether the change is free of * * * retrogressive effect in light of, and with particular attention being given to, the requirements of the 14th, 15th, and 24th amendments to the Constitution, 42 U.S.C. 1971(a) and (b) * * * and other constitutional and statutory provisions designed to safeguard the right to vote from denial or abridgment on account of race, color, or membership in a language minority group.

28 C.F.R. 51.55. The benchmark provides a guide, not an absolute limit below which minority voting strength may not fall. For example, Section 5 does not require jurisdictions to draw plans that violate the one-person, one-vote principle of the Equal Protection Clause, or are otherwise unconstitutional. Similarly, Section 5 does not require a jurisdiction to engage in unconstitutional racial gerrymandering to achieve preclearance, and the Attorney General administers Section 5 in light of that understanding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
BILL LANN LEE
Acting Assistant Attorney General
MARK L. GROSS
REBECCA K. TROTH
Attorneys

APRIL 2000

Supreme Court, U.S.
FILED
MAY 09 2000
CLERK

(6)

No. 99-1203

IN THE
SUPREME COURT OF THE UNITED STATES

Dennis Theriot, et al.,
Petitioners,

v.

Parish of Jefferson, State of Louisiana, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONERS

Haywood H. Hillyer III, La. Bar No. 6925
Attorney-at-Law
P. O. Box 15521
New Orleans, Louisiana 70175-5521
Telephone: (504) 899-0890
Facsimile: (504) 899-4851
Counsel of Record

Of Counsel:
Dominic N. Varrecchio, La. Bar No. 19456
1449 Magazine Street
New Orleans, Louisiana 70130
Telephone: (504) 524-8600

---

13 pp

TABLE OF CONTENTS

Page

1. The Initial Racial Motivation 1

2. The Retrogression Issue: Properly Raised and Correctly Argued 5

3. Other Evidence of the Predominance of a Racial Motivation 6

Conclusion 9

TABLE OF AUTHORITIES

Page(s)

Cases

Beer v. United States, 425 U.S. 130 (1976) 3

Bush v. Vera, 517 U.S. 952 (1996) 7, 10

East Jefferson Coalition v. The Parish of Jefferson, 926 F.2d 487 (5th Cir. 1991) 2, 3, 6, 7, 8

Miller v. Johnson, 515 U.S. 900 (1995) 2, 3, 4, 9

Thornburg v. Gingles, 478 U.S. 30 (1986) 2

White v. Regester, 412 U.S. 755 (1973) 4

Young v. Fordice, 520 U.S. 273 (1997) 6

REPLY BRIEF OF PETITIONERS

MAY IT PLEASE THE COURT:

The briefs of Jefferson Parish[1] and the DOJ[2] contain some of the same clear errors made by the courts below. This reply will treat such few of the more important errors as the page limitations permit.

1. The Initial Racial Motivation.

Racial considerations, with the DOJ's Section 5 preclearance demands as their source, provided the predominant motivation from the very onset of the design of the current District 3. When the DOJ insisted, under threat of denial of preclearance and delay of the scheduled elections, upon a non-retrogression "benchmark" of an enhanced black-majority BVAP,[3] it provided a purely racial motivation: that

---

[1] To minimize repetition, this brief incorporates by reference the statement of the case contained in the Petition for Writ of Certiorari (*q.v.*, please), and will use many of the same abbreviations and identifications of parties, proceedings, and terminology utilized in that document.

[2] The briefs of the Parish and the DOJ will sometimes hereinafter be referred to, together, as "the opposition."

[3] Due to space limitations, petitioners will refer to those record citations made in the footnotes of their original Petition for Writ of Certiorari. For this footnote, please see record citations of footnote 9, pp. 12-13, footnote 4, p. 10 (where the Parish attorney M. Nan Alessandra is informed by the DOJ that a minimum of 52.3% BVAP will be required in the post-1990 Census-adjusted District 3 in order to achieve Section 5 preclearance); footnote 8, pp. 12-13 (where the Parish is advised by its attorney M. Nan Alessandra that a 53% BVAP, and not 52.3%, is the actual figure that it should adopt to avoid Section 5 liability); by footnotes 36, 37 and 39, all p. 22 (Lawson uses the 55% BVAP as a minimum in the current District 3 in order to enlist the *EJC* plaintiffs' support of his plan as settlement of the *EJC* litigation); and finally footnote 38, p. 22 (testimony that Lawson

purely race-based demand was the only reason that the current District 3 became a radical departure from the March 1990 plan, rather than the mere "ministerial" modification that the *EJC*[4] trial judge and all of the *EJC* case parties expected to perform after release of the 1990 Census. In capitulating to the DOJ's racial demand, the Parish adopted the DOJ's racial demand as its own predominating racial motivation. Meeting this racial benchmark – irrespective of its legality – "trumped" all of the other motivations with respect to the wholesale alteration of District 3's boundaries pursuant to the 1990 Census. While there are jurisdictions in which a 55% or 57% BVAP majority district which would be geographically compact as required by this Court in *Thornburg v. Gingles*, 478 U.S. 70, 50 (1986), this was and is not the case in Jefferson Parish upon the release of the 1990 Census, given the Parish's relatively small black population and that population's dispersal. The *Theriot* Fifth Circuit's August 8, 1991 *per curiam* which struck down the Special Master's Plan because it lacked a majority BVAP was done so in legal error, as Section 2 does not always guarantee a black majority remedy – but instead, a reasonable remedy to vote dilution particular to the jurisdiction. That the Parish then did not chose to appeal this erroneous conclusion does not make it any less violative of the *Gingles* requirements or the protection offered to voters under the Equal Protection Clause.

The parallels of the instant case with *Miller v. Johnson*, 515 U.S. 900 (1995) ("*Miller*") are instructive. Of course, a number of distinctions exist, but those distinctions are not

---

actually (wrongly) believed that 55% BVAP was the minimum required to achieve Section 5 preclearance).

[4] Please see citations of the *East Jefferson Coalition v. The Parish of Jefferson* cases made in footnote 1, p. 1 of Petition for Writ of Certiorari.

meaningful here. Here, the DOJ set its retrogression benchmark higher than what would be required by the *Beer v. United States*[5] line of cases (see argument below) in order to require Jefferson Parish to increase, unnecessarily, the percentage of BVAP in a single district; in *Miller*, the DOJ's "max-black" demand was that Georgia increase two black-majority districts to three. Just as in *Miller*, capitulation by the legislative body to the DOJ's racial demands in the instant case constituted adoption of a predominating racial motivation. *See*, 515 U.S. at 917-918. Evidence that the DOJ was operating as a partisan on the side of the *EJC* plaintiffs, and was in effect "strong-arming" Jefferson Parish into the gerrymander, is supplied by the transcript of the Rule 11 hearing testimony of the Parish's Attorney, M. Nan Alessandra, and the affidavit submitted by her in connection therewith (App. K and 4, passim). Ms. Alessandra's 1991 admissions against respondents' 1997 "political" interests are buttressed by the Parish's written submissions of the current plan for approval to the DOJ,[6] and by the letter written to John Tanner of the DOJ by the *EJC* plaintiffs' attorney, M. David Gelfand (the 52.3% BVAP benchmark "was a critical 'ground rule'" in the *EJC* plaintiffs' successful attempt to have the parish draw an enhanced black majority district).[7] Another interesting parallel: In *Miller*, the DOJ's Voting Section of the Civil Rights Division was pushing its "max-black" agenda in late 1991 and early 1992; somewhat contemporaneously, in the spring of 1991, the same Voting Section was making its BVAP percentage increase demands on Jefferson Parish. In *Miller*, it took two denials of

---

[5] 425 U.S. 130 (1976).

[6] Please see the record citations made in Petition for Writ of Certiorari footnote 4, p. 10, and footnote 13, p. 15.

[7] See A100.

preclearance to force the legislative body to adopt the racial agenda; here, the mere threat of preclearance denial was sufficient to cause the Parish to adopt the DOJ's predominant racial motivation and to violate its traditional districting principles in order to augment the District 3 BVAP. The DOJ asserts that it does not require jurisdictions to engage in unconstitutional racial gerrymandering (DOJ brief, p. 20). That definitely was not true of the DOJ in 1991-92, as found by this Court in *Miller v. Johnson, supra*. The DOJ did so in the instant case; this Court can send a salutary message, that the DOJ should not resume that practice, after granting certiorari herein.

It was clear error for the courts below to fail to find that, but for the DOJ's racial demands, the Parish would not have undertaken the post-1990 Census radical restructuring of District 3, and of necessity, District 2, by the adoption of a plan which for the very first time eviscerated the Parish's traditional districting principles. It stands to reason that, if a governing body would not have taken a certain action but for a certain initial motivation (*i.e.*, the mandate of an enhanced black majority in District 3), that motivation must be considered to predominate over any other subsequent motivations that might later come into play. Since that conclusion derives solely from reason, to fail to reach it might fairly be said be as much an error of law as an error of fact.

The deference to local courts in voting district cases, mentioned in *White v. Regester*, 412 U.S. 755 (1973), should be tempered here in light of the *Theriot* trial judge having been a relatively recent appointee with no known previous experience in voting cases, and also by the new Equal Protection issues have since arisen in the context of election districting litigation.

2. The Retrogression Issue: Properly Raised and Correctly Argued.

The DOJ brief attacks a "straw man" in claiming that petitioners raised the retrogression issue with respect to "narrow tailoring"; petitioners at all times have attacked the DOJ's position on retrogression as an improperly-predominant racial motivation. The DOJ and the Parish also contradict each other: the DOJ's brief (p. 17) says the court of appeals "correctly concluded" that 52.3% BVAP was the proper Section 5 benchmark; the Parish brief claims the 52.3% BVAP minimum was "justified," but " not required" (p. 23), and "was not resolved" (p. 12) by either of the lower courts, and therefore is an issue not properly raised here. To the contrary, petitioners raised this retrogression issue in both courts below, and properly bring it before this Court in light the lower courts' actual rulings on this issue – rulings made in clear error.[8]

For petitioners to succeed, of course, we must prove that racial motivations predominated. As demonstrated above, the DOJ's retrogression position provided that improperly predominant racial motivation. And the DOJ position was legally erroneous. Contrary to the DOJ brief, p. 17, the March 1990 plan was not "valid and in effect when the 1990 Census figures were released." Both opposition briefs fail to

---

[8] The Fifth Circuit considered the issue, and faced with the post-1990 Census BVAP increase in District 3's then under-populated boundaries, concluded in its published opinion "A majority-minority district which fell below the documented increase in the BVAP would have been subject to a Section 2 challenge." (See A25). It is true that the trial court used the word "justified" in ruling on the issue: "Because of the increase in black population in District 3 under the findings of the 1990 Census, Jefferson Parish was justified in using 52.3% BVAP as the benchmark to determine retrogression under Section 5." (See A58). Amazingly, the appellate court treated what is clearly a conclusion of law – "justified" here clearly means was legally valid – as a finding of fact.

note that the Parish always went to great pains during the *EJC* litigation to point out that all of the plans confected by the Council in 1989 and 1990 were only adopted conditionally, and "under protest." The Parish maintained throughout that litigation, until the Fifth Circuit issued its March 1991 decision holding otherwise, that the 4-2-1 plan did not violate VRA Section 2. Accordingly, the March 1990 plan did not become "in effect" – the suspensive condition did not occur – until the Fifth Circuit's mandate issued and became final. By that time, the 1990 Census showed the plan was invalid under the one-person/one-vote rule. The March 1990 plan thus cannot provide the benchmark. Instead, the 4-2-1 plan, that had been ordered into effect by an earlier judgment of the Eastern District of Louisiana,[9] was valid and in effect until that plan was struck down by the Fifth Circuit's March 1991 final judgment. Compare *Young v. Fordice*, 520 U.S. 273, 282-283 (1997): a plan [*e.g.*, the *EJC* case 4-2-1 plan] can be in force and effect for many years even though it violated some provision of state law, while a short-lived plan abandoned before any elections were held under it was not "in force and effect." Accordingly, the proper Section 5 benchmark was the 24% found in the highest BVAP 4-2-1 plan district, and any BVAP that complied with Section 5 would not be a retrogression.

3. Other Evidence of the Predominance of a Racial Motivation.

Not only did the racial motivation predominate *ab initio* from the Parish's adoption of the DOJ's improper retrogression standard; both courts below clearly erred in ignoring the record evidence that race also predominated in the actual post-1990 Census reshaping of District 3.

---

[9] *Cedric Floyd v. Parish of Jefferson*, Civil Action No. 86-0265, United States District Court for the Eastern District of Louisiana (1987).

First, both courts clearly erred in looking at the motivations for all of the districts' designs rather than just the motivation for gerrymandering District 3. The incumbents who would run from Districts 5 and 6, under the current plan, got to keep districts basically identical to those under the earlier 1990 plans. Councilman Hooper of District 4 (Kenner), under the 1990 plans, had already reluctantly agreed to sacrifice to District 3 the favorable black precincts he enjoyed under the 4-2-1 plan; in 1991 he only had to accept some additional "bleaching" of his district. Councilman Ward of District 1 was politically satisfied because the changes for 1991 still left him running only from areas from which he had won re-election several times before. Since these four council members' districts were not substantially affected, they did not take an active interest in the shape of District 3 as long as the plan was declared legal and in effect in time for the fall 1991 elections. This is evidenced by the support all four of these incumbents had shown for the earlier plans, by their tacit support for the similar Special Master's (post-1990 Census) Plan.

The only motivations that counted were those that shaped District 3 (and thus the adjoining District 2). Councilman Lawson, with a majority always with him, dictated the shapes of Districts 2 and 3 in all of the Council majority's plans of 1989, 1990, and 1991.[10] He actually acted against his own political self-interest in shaping the current Districts 2 and 3, by seeking a minimum 55% BVAP in District over and above even the DOJ's unreasonable benchmark.[11]

It could only be clear error for the district court to accept Lawson's *Bush v. Vera*-educated 1997 testimony over

---

[10] Please see Petition for Writ of Certiorari, footnote 34, p. 21.

[11] Please see Petition for Writ of Certiorari, footnotes 36, 37, 38, 39, all on p. 22.

contrary admissions also made by him in the 1997 trial and his actual actions in 1989-91. Everyone on the Council knew, at all times pertinent hereto, that Lawson and Giardina would wind up running against each other in the fall of 1991. The *EJC* case record clearly shows that all parties (including Lawson) believed in 1989-90 that the new Census would require only minor "ministerial" changes to the Districts 2 and 3 that they then adapted. So, in all three of those pre-1990 Census plans, Lawson drew District 2 to suit his political needs at Giardina's expense. In drawing District 2 to his political advantage in 1989-90, Lawson always put the heavily white majority part of Avondale in District 3, and put Grand Isle, all of the Lafitte area, and the whole of Woodmere in his District 2. The District 2 he then produced also included some black-majority precincts that would reliably vote for him, a Democrat, against Giardina, a Republican. It is also worth noting again that all of these earlier previous plans respected the Parish's traditional districting principles of north/south boundaries between the West Bank districts.

It was only after Lawson made the post-1990 Census determination to "meet or beat" the minimum 55% BVAP demanded by the *EJC* plaintiffs for District 3 (admittedly in order to get them to accept his plan as a settlement, and further due to Lawson's misguided belief that a 55% BVAP was required to avoid a Section 5 preclearance denial) that he then acted to take the overwhelmingly white portion of Avondale out of District 3 (to lower District 3's white VAP)[12] and to place it into his current District 2. Further, at trial he admitted – with regret – that to increase District 3's BVAP,

---

[12] The *Theriot* trial court erroneously held (A50-51) that this portion of Avondale, taken out of District 3 and placed into District 2 by Lawson, was overwhelmingly black, when the record clearly shows the opposite was true; removing that part of Avondale raised, not lowered, District 3's BVAP.

he was forced to move portions of black population into the new District 3 that he dearly wanted to keep within his District 2 to assist him in the coming race against Republican Giardina. These changes were politically detrimental to him – he narrowly won in 1991, he lost to Giardina in a 1995 re-match. The bizarre "V" shape of District 3 was adopted admittedly and specifically to gerrymander its enhanced BVAP, and required abandoning the Parish's traditional districting principles,[13] with its bizarre shape at the very least providing circumstantial evidence of race predominance in its configuration. *Miller v. Johnson*, 515 U.S. 900, at 912-913 (1995).

Try as the opposition might, this appeal is not a credibility question but an evidentiary one. The trial court's clear errors are evident – by its misapplication of this Court's relevant case holdings, by its opining as to occurrences that were exactly the opposite from those shown by the record, to its admonishing the plaintiffs not to present certain evidence as irrelevant and then basing a judgment upon the lack of such evidence, and yes, by its credibility choices also. Where the trial court does accept some of the overwhelming evidence and testimony proving the plaintiffs' case – such as Lawson's intentionally adopting the non-compact enhanced black majority district – the court simply misapplies the standards in place to determine race-predominance.

Conclusion

Unless certiorari is granted herein and the decisions below are overturned, congressional, state and local redistricting required by the new 2000 Census may likely cause many new racial gerrymanders. The DOJ will be encouraged to insist upon unreasonable retrogression benchmarks as a condition of preclearance, and subject

---

[13] Please see Petition for Writ of Certiorari, footnote 50, p. 26.

jurisdictions will be forced into racial gerrymanders to avoid the cost of litigating Section 5 objectives.

It will then fall upon independent citizens like the lower-middle-income petitioners here, to use limited resources to attempt to right these wrongs, thereby burdening federal district courts. Their and the courts' tasks in the process will be made more difficult because the bodies doing the redistricting, educated by *Bush v. Vera*, will cloak their racial motivation in the language of "politics" in order either to discourage or defeat lawsuits.

The current districting represents an ongoing Equal Protection violation. Because the current districts otherwise would remain in effect until 2004, new elections should be ordered held as soon as possible from non-racially-biased districts. A remand to the Fifth Circuit for a decision on any of the issues would only result in justice delayed for the *Theriot* petitioners, and will deny the proper guidance from this Court needed by the many jurisdictions which will be redistricted next year regarding proper Section 5 benchmarks as well as evidentiary questions involved with Equal Protection claims in the context of election districting. Petitioners respectfully urge that this Court grant certiorari, and that there be a judgment in favor of the plaintiffs, ordering that the Parish of Jefferson's councilmanic districts be redistricted by following traditional districting principles, without allowing racial considerations to predominate.

Respectfully submitted this 8th day of May, 2000.

DOMINIC N. VARRECCHIO
La. Bar Code No. 19456
1449 Magazine Street
New Orleans, LA 70130
Telephone: (504) 524-8600
Of Counsel

HAYWOOD H. HILLYER III
La. Bar Code No. 6925
P. O. Box 15521
New Orleans, LA 70175-5521
Telephone: (504) 899-0890
Counsel of Record
for Petitioners